86-1003

Supreme Court, U.S.
FILED
DEC 18 1986
JOSEPH F. SPANIOL, JR.
CLERK

NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

THOMAS SALINAS, ET AL,
Petitioners

v.

ROADWAY EXPRESS, INC., ET AL,
Respondents

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITIONERS' PETITION FOR CERTIORARI
BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED FOR REVIEW

WHETHER ENTRY OF A CONSENT DECREE BY THE DISTRICT COURT WAS AN ABUSE OF DISCRETION.

WHETHER A CONSENT DECREE WHICH DEPRIVES LONG-TIME CITY TRUCK DRIVERS OF WORK EXPECTATION AS ROAD DRIVERS IS FAIR, JUST AND ADEQUATE.

CERTIFICATE OF INTERESTED PARTIES

Oscar W. Adams, Jr.
Eddie Andrews
Emmett Armstrong
Daniel Arthur
G. William Baab
R. Bertrand
H. Brown
Joe Bush
Joe Carroll
R. R. Carter
Allen Cooper, Jr.
Agapito De LaRosa
Edward Donnette
Eddie Doxie, Jr.
D. Duffie, Jr.
Willie Eckels
Estate of Lincoln Edwards
Arthur Egby, Jr.
Hal K. Gillespie
Z. Grimes
Hobart Haggerty
Webster Henderson
James L. Hicks
Holland Holt
Joe Hubbard
International Brotherhood of Teamsters, Chauffers, Warehousemen, and Helpers of America
Harry James
Jefferson, Sherman & Mims
A. M. Johnson
Robert Kirby
Robert James Lewis
Willie L. Luckett
Wilbert Maltie
Frank Manitzas
Horace Mann
Roy Martinez
Marcus Melchor
Carnegie H. Mims, Jr.
Juvenita Molina
E. D. Monk
Frank Morales
Abel Mosley
Stuart M. Nelkin
Carl Owens
Herbert Perkins
James Perry
James Phipps
Sidney Ravkind
Roadway Express, Inc.
Lorenzo Robertson
Gilbert Romero
Thomas Salinas
Luis Segura
Charles Shelby
E. D. Smith
Bobby Stephens
Isaac Stewart
Ernest Gene Taylor
Arthur Gene Walker
W. D. Weber
Warren Weir
B. T. Wheatley
A. C. Williams

LARRY Q. EVANS

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BRIEF FOR PETITIONERS

OPINION BELOW

The United States Court of Appeals for the Fifth Circuit rendered its first opinion in this case on July 16, 1984. That opinion is reported at 735 F.2d 1574 (5th Cir. 1984). A second per curiam opinion was issued by the United States Court of Appeals for the Fifth Circuit on October 17, 1986. That opinion is reported at 802 F.2d 787 (5th Cir. 1986).

JURISDICTIONAL GROUNDS IN THIS COURT

The judgment of the United States Court of Appeals for the Fifth Circuit was entered on October 17, 1986. Rehearing was not sought. No cross-petition for Writ of Certiorari has been filed. Jurisdiction to review the judgment by Writ of Certiorari is conferred by 28 U.S.C. § 1254(1) (1966 and Supp. 1984).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

1. 28 U.S.C. § 1254(1) which provides:

   Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

   (1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree.

2. 28 U.S.C. § 1291 which provides:

   "The Courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States. . . ."

3. 28 U.S.C. § 1343(4) which provides:

   The districts shall have original jurisdiction of any civil action authorized by law to be commenced by any person: (4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

4. 28 U.S.C. Rule 23(e) which provides:

   A class action shall not be dismissed or compromised without the approval of the court, and notice of the proposed dismissal or compromise shall be given to

all members of the class in such manner as the court directs.

5. 28 U.S.C. Rule 52(a) which provides:

In all actions tried upon the facts without a jury or with an advisory jury the court shall find the facts specially and state separately its conclusions of law thereon, and judgment shall be entered pursuant to Rule 58; and in granting or refusing interlocutory injunctions the court shall similarly set forth the findings of facts and conclusions of law which constitute the grounds of its action. Requests for findings are not necessary for purposes of review. Findings of fact, whether based on oral or documentary evidence, shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. The findings of a master, to the extent that the court adopts them shall be considered as the findings of the court. It will be sufficient if the findings of fact and conclusions of law are stated orally and recorded in open court following the close of the evidence or appear in an opinion or memorandum of decision filed by the court. Findings of fact and conclusions of law are unnecessary on decisions of motions under Rules 12 or 56 or any other motion except as provided in Rule 41(b).

6. 42 U.S.C. § 1981 which provides:

All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

7. 42 U.S.C. § 2000e-2(a)(1) and (2) which provides:

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

8. 42 U.S.C. § 2000e-2(c)(1) and (2) which provides:

It shall be an unlawful employment practice for a labor organization—

(1) to exclude or to expel from its membership, or otherwise to discriminate against, any individual because of his race, color, religion, sex, or national origin;

(2) to limit, segregate, or classify its membership or applicants for membership, or to classify or fail or refuse to refer for employment any individual, in any way which would deprive or tend to deprive any individual of employment opportunities, or would limit such employment opportunities or otherwise adversely affect his status as an employee or as an applicant for employment, because of such individual's race, color, religion, sex, or national origin.

STATEMENT OF THE CASE

This class action Title VII lawsuit was brought for racial and national origin discrimination in the terms and conditions of employment in the trucking industry.

The Petitioners are blacks, Mexican Americans and Spanish-surnamed Americans and/or their heirs, estates or designated guardians, who are city drivers for Roadway Express, Inc., at any time between November 1, 1968 and June 2, 1975, at locations within the Territory covered by the Southern Conference Teamsters Supplemental agreement to the National Master Freight Agreement, excluding the City of Atlanta, Georgia.

On September 17, 1971, this action was commenced in the Western District of Texas against Roadway and the Defendant unions. Specifically, the plaintiffs alleged that Roadway and the union defendants maintained separate seniority systems in collective bargaining for city and road drivers which discriminated against them because of their race and national origin. On November 6, 1974, the Judicial Panel on Multi-District Litigation ordered that this action be consolidated with other similarly pending class actions against Roadway and the union defendants.

The trial of this action was commenced on April 18, 1977. At the conclusion of the plaintiffs' evidence, the trial court found that the plaintiffs had demonstrated a prima facie case of employment discrimination with regard to the transfer of employment of black and Mexican-American city drivers into road-driver positions.

On November 19, 1981, the trial court entered findings of facts and conclusions of law and a judgment. Follow-

ing entry of judgment, notices of appeal were filed by the plaintiffs' class, certain of the individually named plaintiffs, members of the plaintiffs' class and the defendant Roadday. On July 16, 1984, the Fifth Circuit Court of Appeals vacated the judgment of the trial court and remanded the case. *Salinas, et al. v. Roadway Express, Inc., et al.*, 735 F.2d 1574 (5th Cir. 1984).

On remand, counsel for the parties conferred for the purpose of exploring settlement. On April 12, 1985, the trial court granted preliminary approval of a proposed consent decree.

After a fairness hearing on September 20, 1985, the trial court entered an order approving the consent decree on November 4, 1985, and made findings of fact and conclusions of law.

The Petitioners again appealed to the United States Court of Appeals for the Fifth Circuit. On October 17, 1986, the Fifth Circuit affirmed the district court's order entering the decree. *Salinas v. Roadway Express, Inc.*, 802 F.2d 787 (5th Cir. 1986).

The basis of jurisdiction in the United States District Court for the Western District of Texas was 28 U.S.C. § 1343(4). The basis of jurisdiction in the United States Court of Appeals for the Fifth Circuit was 28 U.S.C. § 1291.

ARGUMENT

Petitioners agree that the six-part test in *Parker v. Anderson*, 667 F.2d 1204 at 1209 (5th Cir.), *cert. denied*, 459 U.S. 828 (1982), is controlling. The Petitioners allege, *Parker* notwithstanding, that the consent

decree, when taken as a whole, is not fair, just nor adequate. The Petitioners further allege that the terms and conditions embodied in the consent decree are such a radical departure from the intent and purpose of Title VII of the Civil Rights Act of 1964 as to merit this court's direction and supervision.

It has long been the accepted view that "Congress directed the thrust of the Act to the *consequences* of employment practices, not simply the motivation." *Griggs v. Duke Power Company,* 401 U.S. 432, 91 S. Ct. 849 (1971). If the consequence of the adoption of the consent decree is looked at as opposed to the motivation, one must seriously question what the net result or gain is to the Petitioners.

Here we have black and Spanish-surnamed individuals who worked as city truck drivers for the defendant. They were prohibited from applying for the higher-paying more lucrative road driver jobs. Now, after fifteen years of litigation, a consent decree is entered which says to them that they can now be listed on the seniority board, but with the same seniority date as a new hire. The Petitioners allege that although such a result naturally flows from the initial holding in *International Brotherhood of Teamsters v. United States,* 431 U.S. 324, 97 S. Ct. 1843 (1977), which holds dual seniority systems bona fide, the Petitioners allege that the result of such a following is *devastating* upon them. They, through no act or omission of their own, find themselves having been discriminated against and in so finding also discover that the discrimination will continue for literally the rest of their lives. They will never have the opportunity to work as road drivers. This consequence was eloquently spoken

to by Mr. Justice Marshall in his dissent to *International Brotherhood of Teamsters v. United States* at 431 U.S. 388, 97 S. Ct. 1843 (1977), and is quoted as follows:

> "The Court holds, in essence, that while after 1965 these incumbent employees are entitled to an equal opportunity to advance to more desirable jobs, to take advantage of that opportunity they must pay a price: they must surrender the seniority they have accumulated in their old jobs. For many, the price will be too high, and they will be locked into their previous positions. Even those willing to pay the price will have to reconcile themselves to being forever behind subsequently hired whites who were not discriminatorily assigned. Thus equal opportunity will remain a distant dream for all incumbent employees.
>
> I am aware of nothing in the legislative history of the 1964 Civil Rights Act to suggest that if Congress had focused on this fact it nonetheless would have decided to write off an entire generation of minority-group employees. Nor can I believe that the Congress that enacted Title VII would have agreed to postpone for one generation the achievement of economic equality."

Most of the Petitioners, who have dedicated the majority of their working lives to working as city drivers for the Defendant, now, in the twilight of their careers, have their legitimate expectation that their civil rights would genuinely be vindicated dashed against the rocks of despair and hopelessness and the door of true economic equality forever closed in their faces. Petitioners allege that such was not the intent of Congress in the passage of Title VII and genuinely feel that it was not the intent of this court in its holding in *International Brotherhood*

of Teamsters v. United States. The Petitioners respectfully urge this court to rethink its holding in *International Brotherhood of Teamsters v. United States,* with a view particularly toward the consequences of the holding. If the consequences of the holding are to continue to perpetuate segregation in the Defendants' workforce, then it clearly goes against the intent of Title VII as well as the moral imperative of true economical equality. Petitioners argue that such a consequence, regardless of the motivation, is not fair, just, nor adequate.

In its judgment and findings of fact and conclusions of law entered November 19, 1981, the trial court found that Roadway ceased its unlawful activity on January 1, 1968. Therefore, January 1, 1968, was established as the cut-off date for class membership. The United States Court of Appeals for the Fifth Circuit expressed its concern regarding this finding of fact as follows in *Salinas v. Roadway Express, Inc.,* 735 F.2d 1574 (5th Cir. 1984):

> The court's finding that Roadway ceased its unlawful activity on January 1, 1968, raises cause for concern in that it appears to be contradicted by other findings by the court. For instance, the court found that Roadway never employed a black road driver in the Southern Conference until May 5, 1969, and that no Mexican-American was employed in that position until March 11, 1972. Other of the court's findings also indicate that minorities were dissuaded from applying for road driving positions at least through May 1971. The reason that January 1, 1968, was selected as the cut-off date for class membership cannot be discerned from the district court's findings of fact and conclusions of law. Plaintiffs note that at a hearing on the court's pro-

> posed judgment, the trial judge indicated that he chose that date because class member Willie Luckett received a road driver application on that date in response to a letter that he had written to Roadway. *See* Record Vol. XII at 34-35. In its findings of fact, however, the court found that Luckett did not receive a letter from Roadway detailing the procedure for applying for a road job until March 19, 1971. Even more confusing is the fact that the court granted retroactive seniority to three class members who became city drivers after January 1, 1968. It should also be noted that, in their proposed notices to class members, both Roadway and the Plaintiffs recited that the class included minority employees who did or were doing city driving from November 1, 1968, until the time of suit.
>
> This Court reviews the district court's findings under the clearly erroneous standard. In doing so, we cannot be left to speculate as to the factual basis for the district court's conclusion. This Court cannot determine whether the district court's selection of the January 1, 1968, cut-off date was clearly erroneous when the district court has made no more than conclusory findings. We must therefore vacate the judgment of the district court for failure to comply with Fed. R. Civ. P. 52(a) and remand for findings which indicate, with specificity, the factual basis for the district court's determination of the cut-off date for class membership.

Thereafter, the same cut-off date leaps mysteriously from a position of having a speculative factual basis to prominence again in the form of findings of fact numbers sixty-two (62) and sixty-three (63), in the trial court's findings of fact and conclusions of law of November 4, 1985 which underpin and support the complained of Consent Decree.

The January 1, 1968 cut-off date is important not only because it determines class membership, but also determines the number of road driver vacancies. Therefore, if the trial court found that there were but six vacancies between the effective date of the Act and January 1, 1968, any finding that discriminatory conduct on the part of the Defendants continued past January 1, 1968 (1) enlarges the number of members in the class and (2) increases the number of vacancies available during the relevant time period. Since the January 1, 1968 date was substantially contradicted at trial, sufficiently to cause the United States Court of Appeals for the Fifth Circuit to remand with the instruction that the district court provide specific factual findings in support of the conclusion, it is inconceivable to the Petitioners that the very same conclusion can be allowed to stand based upon the very same deficient factual finding and in the face of the very same contradictions of record.

The total amount of backpay was also a function of the number of vacancies the district court found. *United States v. United States Steel Corp.*, 520 F.2d 1043, 1055-56 (5th Cir. 1975). Furthermore, the finding of January 1, 1968 as the cut-off date for class membership and the number of vacancies is critical because it also determines in the consent decree which individuals would be afforded specific relief. The consent decree at page 23 enumerates those individuals whose claims were of greater value by reason of the fact that they had been previously recognized by the trial court as being entitled to relief. Such recognition was based upon the awarding of retroactive seniority and backpay corresponding to the vacancies occurring between the effective date of the Act and January 1, 1968. Again, if January 1, 1968 were determined

not to be the cut-off date and Petitioners allege that there is ample evidence in the record to so find, the number of vacancies during the relevant period significantly increases as does the number of individuals who should be afforded specific relief.

Because the finding that discrimination ceased on January 1, 1968 in the Defendants' workforce was clearly erroneous at the time of the Fifth Circuit's remand, it is equally clearly erroneous within the context of the consent decree. For this reason, the Petitioners allege that this finding, which underpins the basic consequences of the decree, is not fair, just, nor adequate.

Finally, with regard to the questions raised by *United Airlines, Inc. v. Evans,* 431 U.S. 553, 97 S. Ct. 1885 (1977), it is important to note that the importance of *Evans* is tied directly to the finding of January 1, 1968 as the date that discrimination ended in the Defendants' workforce. Apparently the basis for the trial court's determination of January 1, 1968, was the facts that the first black road driver was hired on or about May 5, 1969, and the first Mexican-American road driver was hired on or about March 11, 1972. However, it is well settled that the hiring of a single black or Spanish-surnamed individual does not signify the end of a discriminatory practice. *Swint v. Pullman-Standard,* 539 F.2d 77 (5th Cir. 1976), reversed on other grounds, 456 U.S. 273 (1982). Therefore, Petitioners allege that once the clearly erroneous cut-off date of January 1, 1968 is discredited, and a more just, fair and adequate date established by the preponderance of credible, believable evidence, the *Evans* question does not loom nearly so ominously.

As this court has previously noted in *Franks v. Bowman Transportation Company*, 42 U.S. 747, 96 S. Ct. 1251, 47 L.Ed.2d 444 (1976), the critical importance of seniority in the trucking industry is that:

> It determines the order of layoff and recall of employees. Further, job assignments for [over the road] drivers are posted for competitive bidding and seniority is used to determine the highest bidder. As [over the road] drivers are paid on a per mile basis, earnings are therefore to some extent a function of seniority.

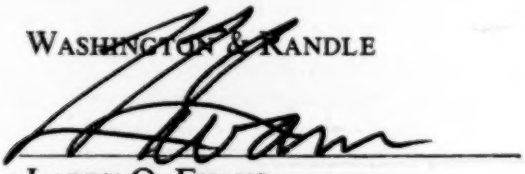
CONCLUSION

Given the critical importance of seniority in the trucking industry, the Petitioners respectfully urge the court to grant this Petition for Writ of Certiorari. This lawsuit represents one of the final chapters in the history of the attempt to desegregate employment in the motor freight industry in the United States. Unfortunately, the consequences of the line of decisions that bring us here have greatly outweighed the motivation. The Petitioners respectfully request this Court to take a long and careful look at those consequences. They will indeed have a far reaching and long range impact upon race relations

and equality among all citizens, particularly those involved in the trucking industry, for generations to come.

Respectfully submitted,

WASHINGTON & RANDLE

By: 

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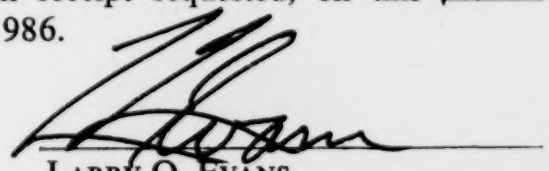
Attorneys for Petitioners

CERTIFICATE OF SERVICE

By my signature below, I do hereby certify that on the 17th day of December, 1986, a true and correct copy of the foregoing Petition for Writ of Certiorari was furnished by United States mail to the following: STUART M. NELKIN, at Nelkin & Nelkin, 5417 Chaucer, Houston, Texas 77005; OSCAR W. ADAMS, III, 729 Brown Barx Building, 2000 First Avenue North, Birmingham, Alabama 35203; WARREN WEIR, at Weir & Alvarado, 115 Cameron, San Antonio, Texas 78205; SIDNEY RAVKIND, at Mandell & Wright, 1901 First National Life Building, Houston, Texas 77002; JAMES L. HICKS, JR., at Hicks, Gillespie, James & Lesser, P.C., P. O. Box 472227, Dallas, Texas 75247; SHELTON E. PADGETT, at Manitzas, Harris & Padgett, 1200 South Texas Building, San Antonio, Texas 78205; CARNEGIE H. MIMS, JR., at 707 Central National Bank Building, 2100 Travis Street, Houston, Texas 77002; and G. WILLIAM BAAB, at Mullinax, Wells & Baab, 8402 Elmbrook, Suite 200, Dallas, Texas 75247, each by certified mail, return receipt requested, on this 17th day of December, 1986.



LARRY Q. EVANS

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APPENDIX TO PETITIONERS' PETITION FOR CERTIORARI BRIEF FOR PETITIONERS

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APPENDIX A

Thomas SALINAS, et al.,
Plaintiffs-Appellees,

E. L. Andrews, et al.,
Plaintiffs-Appellants,

v.

ROADWAY EXPRESS, INC., et al.,
Defendants-Appellees.

No. 85-2726.

United States Court of Appeals,
Fifth Circuit.

Oct. 17, 1986.

The United States District Court for the Western District of Texas, Manuel H. Real, J., sitting by designation, approved consent decree in employment discrimination class action. Appeal was taken. The Court of Appeals held that district court did not abuse its discretion in approving consent decree.

Affirmed.

Larry Q. Evans, Houston, Tex., for plaintiffs-appellants.

Carnegie Mims, Jr., Houston, Tex., for Thomas Salinas and Forty other individuals.

Shelton E. Padgett, San Antonio, Tex., G. William Baab, Dallas, Tex., Kris J. Bird, San Antonio, Tex., for Roadway Express.

Steve Frank, Stuart M. Nelkin, Houston, Tex., Warren Weir, San Antonio, Tex., James L. Hicks, Dallas, Tex., for Class.

Oscar W. Adams, III, Birmingham, Ala., for Curtis Marbury, et al.

Appeals from the United States District Court for the Western District of Texas.

Before POLITZ, RANDALL and JOLLY, Circuit Judges.

PER CURIAM:

In this appeal, certain class members challenge the fairness of a consent decree entered in a class action employment discrimination suit that has involved over fifteen years of litigation. The sole issue for our review is whether the district court abused its discretion by approving the consent decree. All parties agree that the six-part test in *Parker v. Anderson*, 667 F.2d 1204, 1209 (5th Cir.), *cert. denied*, 459 U.S. 828, 103 S. Ct. 63, 74 L.Ed.2d 65 (1982), is controlling. Because the appellants have failed to show that the consent decree is unfair based on even one of the six *Parker* factors, we affirm.

I

This is the second time an appeal from this litigation has come before our court. The facts of the case are fully set out in our earlier opinion, *Salinas v. Roadway Express, Inc.*, 735 F.2d 1574 (5th Cir. 1984). This action originated in September 1971 when black and Mexican-American truck drivers filed a class action employment discrimination suit, alleging that their employer, Roadway Express, Inc. ("Roadway"), violated Title VII of

the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq.* ("the Act"). The plaintiff class alleged that Roadway awarded the higher-paying position of road driver to white employees while giving the lower paying position of city driver to blacks and Hispanics. The class also contended that the union had violated 42 U.S.C. § 1981 by agreeing to maintain a dual seniority system for city and road drivers in the collective bargaining agreement. After five years of discovery, the action was tried. In bifurcated proceedings, the district court found that the plaintiffs had demonstrated a prima facie case of employment discrimination by Roadway but that Roadway ended its discriminatory practices on January 1, 1968. This conclusion was not supported by specific factual findings. The district court held further that the dual seniority system in the collective bargaining agreement was nondiscriminatory. The court denied back pay to class members, awarded retroactive seniority to ten members and awarded attorneys' fees to class counsel. The plaintiff class appealed.

A panel of this court vacated the judgment and remanded. *Salinas,* 735 F.2d 1574. Because the district court provided no specific findings of fact to support its conclusion that Roadway's discriminatory practices ended on January 1, 1968, the panel held that the district court failed to comply with Fed. R. Civ. P. 52(a). This court also held that (1) the district court erred in denying back pay; (2) it improperly limited relief to those few class members who had made inquiries about placement in road driver positions prior to the litigation; (3) the dual seniority system was nondiscriminatory; and (4) on remand the district court should recalculate the seniority date of each plaintiff, using the formula in *Sagers v.*

Yellow Freight Systems, Inc., 529 F.2d 721 (5th Cir. 1976).

The court left unresolved Roadway's claim that no employee had filed a timely discrimination complaint with the EEOC. Roadway contended that the first EEOC complaint against it was filed in February 1971, after the expiration of EEOC's 180-day statutory filing period. Under *United Air Lines v. Evans*, 431 U.S. 553, 97 S. Ct. 1885, 52 L.Ed.2d 571 (1977), the action was arguably untimely and subject to dismissal. However, the panel postponed resolution of Roadway's claim until the district court provided findings concerning the date discrimination ended. Thus, if the district court had provided adequate factual support for its original finding of a 1968 discrimination cutoff date, the plaintiff class would have risked dismissal of the action as untimely, thereby losing *all* relief.

Faced with this uncertainty, the parties began protracted and emotionally charged negotiations that finally resulted in the now disputed consent decree. On April 12, 1985, the district court granted preliminary approval of a proposed consent decree. Fifty-two individuals filed objections to the proposal. Forty-two of the objectors belonged to the plaintiff class that was comprised of 122 members. Following a fairness hearing, the district court entered an order on November 4, 1985, approving the consent decree.

Under the current settlement terms, all class members receive a monetary award, and ten members retain over-the-road seniority retroactive to March 1971. All members may transfer, without seniority, from a city driver to a road driver position. If members elect to transfer,

they retain a thirty-day reversal right with seniority to their former positions.

II

At oral argument, counsel for the objecting class members argued that the district court incorrectly concluded that only twelve road driver vacancies existed in the Southern Conference of Teamsters between the effective date of the Act and January 1, 1968, the discrimination cutoff date. Counsel also claimed that the district court did not properly assess the decree because consenting class members did not testify at the fairness hearing. Finally, counsel argued that seniority calculations in the consent decree did not comply with the *Sagers* formula.

On this record we find no support for the objectors' contention that the available road driver positions in the Southern Conference prior to 1968 exceeded the vacancies indicated by the district court. In fact, at trial the objectors' expert witness only testified about road driver vacancies nationwide. This testimony provides no basis for determining Southern Conference vacancies, and any attempt to do so would be speculative at best.

[1, 2] Moreover, the lack of testimony from consenting class members at the fairness hearing was in no way prejudicial to the objectors. Counsel suggested that consenting members agreed to the decree solely to avoid protracted litigation. Even assuming this were correct, a class member's desire to reach a settlement after fifteen years of litigation is certainly reasonable and does not indicate unfairness in either the consent decree or the negotiating process. Finally, we note that this testimony was available to the objectors through subpoena, but they failed to call any consenting members as witnesses.

[3] The objectors' final argument, that the district court erred in approving the seniority calculations, also fails. Not only is the dual seniority system, of which they complain, valid, *International Brotherhood of Teamsters v. United States*, 431 U.S. 324, 97 S. Ct. 1843, 52 L.Ed. 2d 396 (1977), but the district court approved these calculations, based upon its evaluation of the availability of road driver positions, a determination within its discretion under *Sagers*. *See Sagers*, 529 F.2d at 734.

III

[4] Despite the objectors' complaints expressed at oral argument, there is no dispute that in determining whether the trial court abused its discretion, this court must evaluate the consent decree according to the six-factor test articulated in *Parker*, 667 F.2d at 1209. The factors we must consider are (1) whether the settlement was a product of fraud or collusion; (2) the complexity, expense, and likely duration of litigation; (3) the stage of the proceedings and the actual amount of discovery completed; (4) the factual and legal obstacles to prevailing on the merits; (5) the possible range of recovery and the certainty of damages; and (6) the respective opinions of the participants, including class counsel, class representatives and the absent class members. *See also Pettaway v. American Cast Iron Co.*, 576 F.2d 1157 (5th Cir. 1978), *cert. denied*, 439 U.S. 1115, 99 S. Ct. 1020, 59 L.Ed.2d 74 (1979).

[5] It is clear from the record that the objectors have failed to meet their burden under every factor of the *Parker* test and are unable to show any unfairness, injustice or inadequacy in the consent decree. First, the objectors concede that there was no fraud or collusion

during the negotiations. Second, although the objectors agree that the litigation has thus far been complex and expensive, they suggest that, at the time of settlement, recalculating seniority rights according to their interpretation of the *Sagers* formula would not have been a lengthy matter. We disagree. Seniority rights was the most controversial and hard-fought of all the issues in this case. All negotiating parties view the compromise now reached on seniority rights as the most formidable achievement of the two years of negotiations following our remand. If this issue were litigated, the myriad legal and equitable considerations involved in granting seniority rights to some class members at the expense of other employees already on seniority waiting lists would have surely resulted in prolonged legal battles.

The objectors also fail to show any unfairness based on the third prong of the *Parker* test. The settlement occurred late in the proceedings following a prior appeal to this court. All discovery, which occurred over a five-year period, was complete. Any further delay in arriving at a settlement could have impaired the class members' chance for any recovery.

The fourth and perhaps most crucial consideration in this litigation was the factual and legal obstacles threatening the class's chance of success on the merits. Quite simply, if, on remand, the district court had found that discrimination ended on January 1, 1968, the suit could have been dismissed as untimely under *Evans,* and class members would have received no compensation whatsoever. This tenuous legal and factual posture weighs heavily in favor of approving the present settlement. In addition, the class members' possible monetary recovery

was far from certain; it ranged from zero to several million dollars.

Finally, approximately thirty-four percent of the known class members filed objections. This percentage is not unreasonable in comparison to the number of objectors in similarly contested consent decrees that were approved by this court. Class counsel also strongly recommended acceptance of the consent decree, which he described as a "remarkable victory" for the plaintiffs.

While we appreciate and sympathize with the individual complaints and concerns expressed by the objectors, we remind the objectors and all other parties that a consent decree is a compromise that cannot possibly satisfy every class member's particular desires; rather, the decree must embody the best settlement available to the class as a whole. This record indicates that gains reached during the settlement could have been delayed, jeopardized or even lost entirely if litigation had continued. Thus, compromises here were fully justified so as not to gamble with the rights of everybody to satisfy the complaints of some.

We hold therefore that under the applicable legal standards, the district court's order entering this consent decree is

AFFIRMED.

APPENDIX B

Thomas SALINAS, et al.,
Plaintiffs-Appellants Cross-Appellees,

and

Chester Torry,
Plaintiff-Intervenor-Appellant Cross-Appellee,

and

Stuart M. Nelkin and Warren Weir,
Appellants,

v.

ROADWAY EXPRESS, INC., et al.,
Defendants-Appellees,

Roadway Express, Inc.,
Defendant-Appellee Cross-Appellant.

No. 81-1623.

United States Court of Appeals,
Fifth Circuit.

July 16, 1984.

Black and Mexican-American truck drivers brought class action employment discrimination suit against trucking company, alleging that company violated Title VII by favoring white employes for higher paying position of road driver while non-whites were relegated to lower paying position of city driver. The United States District Court for the Western District of Texas, Manuel H. Real, J. (sitting by designation), held that a prima facie case

of employment discrimination was established, but that such activity by company ceased on January 1, 1968, and awarded retroactive seniority to ten class members and attorneys' fees to class counsel, but denied back pay. Drivers appealed and trucking company cross-appealed. The Court of Appeals, Johnson, Circuit Judge, held that: (1) remand was required to establish factual basis for district court's finding that January 1, 1968 constituted class membership cutoff date; (2) trial court erred in lenying back pay on ground that evidence failed to demonstrate in any quantifiable way a means by which back pay could be awarded; (3) court erred in excluding class members who took no overt action to secure a road job, as such members should have been afforded an opportunity to demonstrate a present willingness to transfer to road jobs; (4) as particular driver could not have pursued his own Title VII action by reason of dismissal of prior action with prejudice, court was correct in not allowing him to intervene; and (5) dual seniority system effective under collective bargaining agreement between company and union was bona fide and nondiscriminatory.

Vacated and remanded.

Carnegie H. Mims, Jr., Houston, Tex., for Salinas.

Richard B. Fields, Memphis, Tenn., for Chester Torry.

Stuart M. Nelkin, Rose Ann Reeser, Houston, Tex., Warren Weir, San Antonio, Tex., Joel J. Reinfeld, Houston, Tex. (on the brief), for Nelkin and Weir.

Frank Manitzas, Shelton E. Padgett, San Antonio, Tex., for Roadway.

James L. Hicks, Jr., Dallas, Tex., for Teamsters Local 657 and 988.

G. William Baab, Dallas, Tex., for Intern. Broth. of Teamsters etc.

Appeals from the United States District Court For the Western District of Texas.

Before GEE, RANDALL, and JOHNSON, Circuit Judges.

JOHNSON, Circuit Judge:

On September 17, 1971, black and Mexican-American truck drivers brought a class action employment discrimination suit in the Western District of Texas against their employer, Roadway Express, Inc. (Roadway), and their union representatives seeking equitable relief and back pay. The plaintiffs alleged that defendant Roadway had violated Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq.*, by favoring white employees for the higher paying position of road driver while non-whites were relegated to the lower paying position of city driver. The employees also contended that the union had violated the Act by agreeing with the employer to establish and maintain a dual seniority system in the collective bargaining agreement for city and road drivers which perpetuated past discriminatory practices. *See* 42 U.S.C. § 1981. Three other class actions involving similar issues, a substantially similar class, and virtually the same defendants were subsequently consolidated with the instant action for coordinated pretrial proceedings. The district court thereafter dismissed the other actions but allowed two of the named plaintiffs to intervene in this suit. The motions

of George Salazar and Chester Torry to intervene as named plaintiffs were denied by the court.

Following a period of over five years in which the parties engaged in extensive discovery, the action was tried before the district court in April 1977. The trial judge bifurcated the proceedings into Phases I (liability) and II (remedy). At the conclusion of the Phase I proceedings, the court found that the plaintiffs had demonstrated a *prima facie* case of employment discrimination by Roadway; but, that such activity by the employer ceased on January 1, 1968. In Phase II, the court awarded retroactive seniority to ten class members and attorneys' fees to class counsel, but denied back pay. The court also concluded that the dual seniority system effective under the collective bargaining agreement is bona fide and nondiscriminatory. On appeal, the plaintiff class contends that the district court erred in: (1) finding that Roadway ceased discriminatory practices on January 1, 1968; (2) denying back pay; (3) its determination of seniority dates; (4) limiting relief to only those class members who did some overt act evidencing an intent to secure a road job; and (5) refusing to allow George Salazar to intervene. Plaintiff Thomas Salinas also challenges the court's holding that the dual seniority system is lawful. Chester Torry contends that the court erred in refusing to allow him to intervene. On cross-appeal, Roadway maintains that the court erred in not granting its motion for judgment as to all liability. We vacate the judgment of the district court for failure to comply with Fed. R. Civ. P. 52(a) and remand.

Roadway is the largest common carrier of general commodity freight in the United States, operating termi-

nals in thirty-three states. For the purposes of collective bargaining, Roadway drivers are represented by the International Brotherhood of Teamsters (Teamsters). The Southern Conference of Teamsters is a delegate body of the Teamsters composed of representatives of the affiliated local unions in ten southern states. There are separate collective bargaining contracts between Roadway and the union concerning city and road drivers which establish different terms and conditions of employment, including seniority lists, rates of pay, and levels and types of fringe benefits. Thomas Salinas, as named plaintiff, brought suit on behalf of the class of black and Mexican-American city truck drivers in the Southern Conference. The certified class consisted of:

> All persons who have been reported by Roadway Express, Inc. to the Equal Employment Opportunity Commission as Negroes, Mexican Americans and Spanish Surnamed Americans, who do or did city driving for Roadway Express, Inc. at any time from November 21, 1968, until the present time, within the territory covered by the Southern Conference of Teamsters Supplemental Agreement to The National Master Freight Agreement (Arkansas, Louisiana, Oklahoma, Texas, Florida, Georgia, Mississippi, Tennessee and the City of Asheville, North Carolina).

Record Vol. III at 1614. In substance, the plaintiffs alleged that prior to the filing of their lawsuit in 1971, Roadway discriminated against blacks, Mexican-Americans, and Spanish-surnamed Americans in its hiring practices, and that Roadway's "no transfer" policy, coupled with the union's dual seniority system, perpetuated the

effects of the discriminatory hiring practices even after the practices ceased.[1]

Class Membership Cutoff Date

The district court found that through statistical proof, as well as through individual testimony and exhibits, the plaintiffs had demonstrated a system-wide pattern and practice of racial discrimination by Roadway relative to the filling of road driving positions. The court also found: "However, the credible, believable evidence demonstrated that such activity by Roadway Express, Inc., ceased on January 1, 1968." Record Vol. X at 55. The plaintiffs maintain that the court's determination of the cutoff date for class membership was arbitrary.

The court's finding that Roadway ceased its unlawful activity on January 1, 1968, raises cause for concern in that it appears to be contradicted by other findings by the court. For instance, the court found that Roadway never employed a black road driver in the Southern

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1. Virtually the same attacks were made against Roadway's employment practices in a previous Title VII action. In *Bing v. Roadway Express, Inc.*, 444 F.2d 687, 688 (5th Cir. 1971) (*Bing I*), a class action brought by black city drivers in Roadway's Atlanta, Georgia, terminal, this Court detailed Roadway's "no transfer" policy:

> Roadway . . . has intentionally discouraged transfers between the collective bargaining units—particularly between the road driver unit and the city driver unit—through the application of a 'no transfer' rule. The rule, in effect, requires an employee who desires to transfer to another job to resign his present position and thereby forfeit the employment rights accrued under it. He must then apply for the new position as if he were a stranger to the Company, with no assurance from Roadway prior to resigning his job that he will be hired for the new position.

The *Bing I* Court found the conclusion inescapable that the no-transfer policy indeed had the effect of perpetuating Roadway's past discriminatory hiring policy. 444 F.2d at 690.

Conference until May 5, 1969, and that no Mexican-American was employed in that position until March 11, 1972. Other of the court's findings also indicate that minorities were dissuaded from applying for road driving positions at least through May 1971. The reason that January 1, 1968, was selected as the cutoff date for class membership cannot be discerned from the district court's findings of fact and conclusions of law. Plaintiffs note that at a hearing on the court's proposed judgment, the trial judge indicated that he chose that date because class member Willie Luckett received a road driver application on that date in response to a letter that he had written to Roadway. *See* Record Vol. XII at 34-35. In its findings of fact, however, the court found that Luckett did not receive a letter from Roadway detailing the procedure for applying for a road job until March 19, 1971. Even more confusing is the fact that the court granted retroactive seniority to three class members who became city drivers *after* January 1, 1968. It should also be noted that, in their proposed notices to class members, both Roadway and the plaintiffs recited that the class included minority employees who did or were doing city driving from November 1, 1968, until the time of suit.

[1, 2] This Court reviews the district court's findings under the clearly erroneous standard. In doing so, we cannot be left to speculate as to the factual basis for the district court's conclusion. This Court cannot determine whether the district court's selection of the January 1, 1968, cutoff date was clearly erroneous when the district court has made no more than conclusory findings. We must therefore vacate the judgment of the district court

for failure to comply with Fed. R. Civ. P. 52(a)[2] and remand for findings which indicate, with specificity, the factual basis for the district court's determination of the cutoff date for class membership. *See Redditt v. Mississippi Extended Care Centers, Inc.*, 718 F.2d 1381, 1386 (5th Cir. 1983). In an effort to guide the court upon remand, we note that this Court has recognized the desirability of establishing a cutoff date for class membership in a Title VII suit in order to facilitate the disposition of the case. *Sagers v. Yellow Freight System, Inc.*, 529 F.2d 721 (5th Cir. 1976). In *Sagers*, this Court held that the district court did not err in establishing a cutoff date where there was ample unrefuted statistical evidence to support a finding that discrimination persisted at least until the cutoff date, and both the company and the plaintiff could agree on the date. 529 F.2d at 735. On remand, the district court is free to modify its ultimate conclusion concerning the cutoff date, or it may adhere to its original conclusion. It is stressed, however, that it is encumbent upon the court to clearly express the factual basis for its determination.

Denial of Back Pay Relief

[3-5] Plaintiffs next challenge the district court's refusal to grant relief in the form of back pay. The district court found that "[t]he evidence adduced at trial failed to demonstrate in any quantifiable way a means by which back pay could be awarded. . . ." Record Vol. X at 56. The court also found that there were no equitable reasons to award back pay. Difficulty in calculating the precise

2. Fed. R. Civ. P. 52(a) provides that "[i]n all actions tried upon the facts without a jury . . . the court shall find the facts specially and state separately its conclusions of law thereon. . . ."

amount of back pay does not defeat the right itself. *Pettway v. American Cast Iron Pipe Co.*, 494 F.2d 211, 260 (5th Cir. 1974), *cert. denied*, 439 U.S. 1115, 99 S. Ct. 1020, 59 L.Ed.2d 74 (1979). Indeed, "in computing a back pay award two principles are lucid: (1) unrealistic exactitude is not required, (2) uncertainties in determining what an employee would have earned but for discrimination, should be resolved against the discriminating employer." *Id.* at 260-61 (footnotes omitted). Moreover, when a class sustains an economic loss from discriminatory employment practices, there is a presumption in favor of back pay. *United States v. United States Steel Corp.*, 520 F.2d 1043, 1053-54 (5th Cir. 1975), *cert. denied*, 429 U.S. 817, 97 S. Ct. 61, 50 L.Ed.2d 77 (1976). Thus, back pay should be denied "only for reasons which, if generally applied, would not frustrate the central statutory purposes of eradicating discrimination throughout the economy and making persons whole for injuries suffered through past discrimination." *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 421, 95 S. Ct. 2362, 2373, 45 L.Ed.2d 280 (1975). During the remedy phase of the trial, plaintiffs offered the testimony of an expert witness who compared the wages of city and road drivers between 1968 and 1974 and computed a differential of average wages between the two positions from 1969 to 1974. The expert also testified that it was possible to do individual calculations. This evidence stands in stark contrast to the district court's findings. Upon remand, the back pay issue should be reconsidered by the court.

Rightful Place Seniority

[6] Plaintiffs also maintain that the district court erred in its determination of seniority dates. In cases of this

type, the calculation of rightful place seniority is predicated upon the date that an individual class member qualified for road employment *and* such a position became available. *Sagers,* 529 F.2d at 734; *see also Rodriguez v. East Texas Motor Freight,* 505 F.2d 40 (5th Cir. 1974); *Bing v. Roadway Express, Inc.,* 485 F.2d 441 (5th Cir. 1973) (*Bing II*). In the instant case, the district court granted road terminal seniority to ten class members retroactive to March 19, 1971. March 19, 1971, is presumably the date that the first vacancy occurred after January 1, 1968. Upon remand, the district court should recalculate the seniority date of each individual paintiff found to be entitled to relief utilizing the formula enunciated in *Sagers. See* 529 F.2d at 734.

Proof of Willingness to Transfer

[7] The plaintiff class maintains that the district court erred in granting relief only to those ten class members who the court determined were ready, willing, and able to accept employment as over-the-road drivers. The court expressly found that only those ten individuals made informal inquiry concerning road jobs, expressed an interest in obtaining road jobs, and took some overt action to secure road jobs. In *International Brotherhood of Teamsters v. United States,* 431 U.S. 324, 365-66, 97 S. Ct. 1843, 1870, 52 L.Ed.2d 396 (1977), the Court acknowledged that "[w]hen a person's desire for a job is not translated into a formal application solely because of his unwillingness to engage in a futile gesture he is as much a victim of discrimination as is he who goes through the motions of submitting an application." Indeed, the best indication of whether a city driver desired to transfer to a road job in the past is reflected in whether he presently

desires to transfer. *See Rodriguez*, 505 F.2d at 64. It was therefore error for the district court to out of hand exclude class members who took no overt action to secure a road job. Upon remand, the court should afford an opportunity to class members excluded from relief to demonstrate their present willingness to transfer to road jobs.

George Salazar

[8] The plaintiff class contends that George Salazar should have been allowed to intervene as a named plaintiff because he had filed a charge with the Equal Employment Opportunity Commission (EEOC) on April 15, 1966, and had obtained a right-to-sue letter. After Salazar received the right-to-sue letter, however, he failed to timely institute the required civil action. When Salazar did eventually file suit, his action was dismissed with prejudice by the district court, and he did not appeal the dismissal. In order to qualify as a named plaintiff in the instant action, Salazar must have been in a position to pursue his own Title VII action. *See Hodge v. McLean Trucking Co.*, 607 F.2d 1118, 1120-21 (5th Cir. 1979). Since Salazar could not have pursued his own Title VII action, the court was correct in not allowing him to intervene.

Chester Torry

[9] On November 17, 1971, Chester Torry filed an EEOC charge in Memphis against Roadway. Upon receiving a right-to-sue letter, he timely filed a class action suit in the Western District of Tennessee in December 1976. In February 1977, Roadway moved for a protective order on the grounds that Torry was included

in the class as defined by the court in the instant action. Torry thereafter made a motion to intervene in this action, which the district court denied. The relief fashioned by the district court in its final judgment was limited to drivers in the Houston, Dallas, and San Antonio terminals. On appeal, Torry contends that the district court apparently excluded the Memphis class members because it believed that the consent decree in *United States v. Roadway Express, Inc.*, 2 Empl. Prac. Dec. (CCH) ¶ 10,295 (N.D. Ohio 1970), was *res judicata* as to their claims.

In May 1968, the United States Attorney General brought suit against Roadway in federal court in the Northern District of Ohio alleging that Roadway was engaged in a system-wide pattern and practice of denying employment opportunities to blacks. After extensive litigation and negotiations, a consent decree was entered by the district court on September 1, 1970. The Teamsters, though never formally made a party to the litigation, also participated in the formulation of the consent decree. The decree enjoined Roadway from:

> (a) engaging in any act or practice whereby Negroes are denied equal employment opportunities because of race or color including the right to be hired, promoted, upgraded or assigned, and continued in employment;
>
> (b) failing or refusing to hire, promote, upgrade or reassign any individual, terminating any individual's status as an employee or applicant for employment because of his race or color;
>
> (c) engaging in any act or practice which has the purpose or effect of discriminating against any individual because of his race or color.

United States v. Roadway, 2 Empl. Prac. Dec. at ¶ 10,295. The decree also permitted all city drivers at Baltimore/Washington and Dallas, regardless of race, to request consideration for transfer to a road driver position between October 1 and October 30, 1970. The decree further directed Roadway to offer to thirty-two named individuals, who had unsuccessfully sought to apply for over-the-road positions at Memphis in January 1968, over-the-road positions if they were qualified, as vacancies occurred.

Torry maintains that for purposes of *res judicata* and collateral estoppel, he and the Memphis class are not bound by the prior action by the Attorney General because they were neither parties to it, nor have interests such as to be in privity with the Attorney General. Although Torry was employed by Roadway as a city driver on September 1, 1970, the date of the consent decree, he and the class of black city drivers that he purports to represent were not granted any relief as a result of the decree because the decree made no provision for black city drivers who desired to transfer to road driving positions after January 1968. Thus, his action sought an extension of the relief granted in *United States v. Roadway*, and was not precluded by the consent decree. *See Rodriguez*, 505 F.2d at 65. *Williamson v. Bethlehem Steel Corp.*, 468 F.2d 1201 (2d Cir. 1972), *cert. denied*, 411 U.S. 931, 93 S.Ct. 1893, 36 L.Ed.2d 390 (1973). On remand, the district court should proceed to the merits of Torry's claim.

Dual Seniority System

[10] Plaintiff Salinas challenges the court's conclusion that the dual seniority system effective under the col-

lective bargaining agreement between Roadway and the union is bona fide and nondiscriminatory. The identical seniority system was reviewed by the Supreme Court in *Teamsters*. There, the Court held that "an otherwise neutral, legitimate seniority system does not become unlawful under Title VII simply because it may perpetuate pre-Act discrimination. Congress did not intend to make it illegal for employees with vested seniority rights to continue to exercise those rights, even at the expense of pre-Act discriminatees." 431 U.S. at 353-54, 97 S.Ct. at 1864. We therefore reject Salinas' contention.

Timeliness of Plaintiffs' Action

On cross-appeal, Roadway contends that it was entitled to judgment as to all liability because a discrimination charge by a class member was not timely filed with the EEOC. Thomas Salinas filed a charge of discrimination with the EEOC in February 1971. He received a right-to-sue letter in September 1971 and filed suit in district court shortly thereafter. Because the district court found that Roadway ceased its discriminatory practices on January 1, 1968, Roadway reasons that under *United Air Lines v. Evans,* 431 U.S. 553, 97 S.Ct. 1885, 52 L.Ed.2d 571 (1977), plaintiffs' suit was untimely because the EEOC charge was not filed within 180 days of the end of discrimination. In *Evans,* the Supreme Court held that the operation of United's seniority system was not unlawful under Title VII even though it perpetuated post-Act discrimination, because the discrimination had not been the subject of a timely complaint by the discriminatee. 431 U.S. at 558, 97 S. Ct. at 1889. Roadway's contention that plaintiffs' action was untimely is inextricably

tied to the district court's finding that discrimination by Roadway ceased on January 1, 1968. Because we vacate and remand the district court's judgment for more complete findings, we do not reach defendant's argument.

The judgment of the district court is vacated and the cause remanded for proceedings not inconsistent with this opinion.

VACATED AND REMANDED.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

CIVIL ACTION NO. SA-71-CA-254

THOMAS SALINAS, et al.,
Plaintiffs,

v.

ROADWAY EXPRESS, INC., et al.,
Defendants.

(Filed November 12, 1985)

FINDINGS OF FACT AND CONCLUSIONS OF LAW APPROVING PROPOSED CONSENT DECREE

On September 20, 1985, came on to be heard and considered the Proposed Consent Decree (hereinafter "the Decree") which has been jointly filed and proposed by Defendant Roadway Express, Inc. (hereinafter "Roadway"), Counsel for the Plaintiffs' Class and Counsel for certain of the individually Named Plaintiffs and known members of Plaintiffs' Class as to all provisions and by the Defendant's International Brotherhood of Teamsters, Southern Conference of Teamsters, and Locals 657 and 988 of the International Brotherhood of Teamsters (hereinafter collectively referred to as "the Union Defendants"). The following Findings of Fact and Conclusions of Law Approving the Proposed Consent Decree are made by this Court based upon the credible and believ-

able evidence adduced during the trial and hearing before this Court to determine whether to approve or reject the proposed settlement contained in the Decree together with the entire record in this proceeding and this Court's knowledge thereof.

FINDINGS OF FACT

1. Roadway is incorporated under the laws of the State of Delaware and has its principal place of business in the State of Ohio, and at all times pertinent to this action has done business within the Western District of Texas where it has been engaged in the business of transporting commercial freight.

2. Defendant, International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (hereinafter "International") is an unincorporated association which has done business in the Western District of Texas at all times pertinent to this action. The Southern Conference of Teamsters (hereinafter "Southern Conference") is a delegate body of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, made up of representatives of the affiliated locals within the States of Alabama, Arkansas, Louisiana, Florida, Georgia, Mississippi, Tennessee, Texas, Oklahoma, and North Carolina.

3. Defendant Locals 657 and 988 are labor organizations within the meaning of Section 701(d) of Title VII of the Civil Rights Act of 1964 and are affiliated with the Defendant's International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America and the Southern Conference of Teamsters. Defendant Local 657 of the International Brotherhood of Teamsters,

Chauffeurs, Warehousemen and Helpers of America has its principal place of business in San Antonio, Texas. Defendant Teamsters Local 988 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America has its principal place of business in Houston, Texas.

4. The Plaintiffs are former Blacks, Mexican-Americans and Spanish-Surnamed Americans (and/or their heirs, estates or duly designated guardians), who were city drivers for Roadway at any time between November 1, 1968, and June 2, 1975, at locations within the territory covered by the Southern Conference of Teamsters Supplemental Agreement to the National Master Freight Agreement, excluding the City of Atlanta, Georgia.

5. On May 2, 1968, the Attorney General of the United States instituted an action under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, (hereinafter "Title VII") against Roadway in the Northern District of Ohio in *United States of America v. Roadway Express, Inc.*, Civil Action No. C-68-321, reported at 3 EPD ¶ 10, 295, alleging that Roadway was engaged in a system-wide "pattern and practice" of denying employment opportunities to Blacks in violation of Title VII. Although the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America was not a named Defendant in this action, counsel for the Teamsters participated in pre-trial and settlement conferences.

6. Following extensive discovery, including some 106 depositions, trial began before the District Court in Ohio on January 6, 1970, and proceeded until January 14, 1970. At that time trial was recessed until March 13,

1970, when it resumed and continued until March 20, 1970, when it was again recessed. Thereafter, the District Court in Ohio entered a Consent Decree on September 1, 1970, enjoining Roadway from:

(a) engaging in any act or practice whereby Negroes are denied equal employment opportunities because of race or color including the right to be hired, promoted, upgraded or assigned, and continued in employment;

(b) failing or refusing to hire, promote, upgrade or reassign any individual, terminating any individual's status as an employee or applicant for employment because of his race or color; and,

(c) engaging in any act or practice which has the purpose or effect of discriminating against any individual because of his race or color.

(See: Plaintiff's Exhibit 69, p. 307, introduced during Trial on the Merits). By Order filed May 2, 1975, this Court ordered the entire case file in the *United States v. Roadway Express, Inc.,* transferred to the United States District Clerk for the Western District of Texas, San Antonio Division. (R., Vol. III, Doc. 103).

7. The Consent Decree entered by the Court in *United States v. Roadway Express, Inc.,* on September 1, 1970, excluded relief provisions for Black employees of Roadway's Atlanta, Georgia, Terminal since that facility was the subject of a pre-existing Title VII suit brought against Roadway by a Black employee prior to the filing of the Government's suit. *Bing v. Roadway Express, Inc.,* 444 F.2d 687 (5th Cir. 1971), (Bing I); and, *Bing II,* 485 F.2d 441 (5th Cir. 1973).

8. On September 17, 1971, this action was commenced in the Western District of Texas against Roadway and the Union Defendants by Black and Mexican-American city drivers employed at Roadway alleging violations of Title VII and that portion of Section 2 of the Civil Rights Act of 1866 now codified under 42 U.S.C. § 1981. Specifically, the Plaintiffs allege that Roadway and the Union Defendants maintain separate seniority systems in the Collective Bargaining Agreement for city and road drivers which discriminates against them because of their race and national origin.

9. On November 6, 1974, pursuant to 28 U.S.C. § 1407, the Judicial Panel on Multi-district Litigatoin ordered that this action be consolidated with other similar pending class actions against Roadway and the Union Defendants for pre-trial proceedings. (R., Vol. III, Doc. No. 96).

10. Following a hearing on May 1, 1975, this Court entered an order on June 2, 1975, certifying this case as a class action under Rule 23, Federal Rules of Civil Procedure, dismissing the consolidated actions and permitting the Named Plaintiffs in the dismissed actions to intervene herein. (R., Vol. III, Doc. 108). This Court's Order of June 2, 1975, defined the class in this action as follows:

> All persons who had been reported by Roadway Express, Inc., to the Equal Employment Opportunity Commission as Negroes, Mexican-American and Spanish-Surnamed Americans, who do or did city driving for Roadway Express, Inc. at any time from November 21, 1968, until the present time, within the territory covered by the Southern Conference of Teamsters Supplemental Agreement to the

National Master Freight Agreement (Arkansas, Louisiana, Oklahoma, Texas, Florida, Georgia, Mississippi, Tennessee and the City of Asheville, North Carolina).

(R., Vol. III, Doc. 108, p. 3).

11. Following a period of some five and one-half years of extensive discovery, trial of this action commenced on April 18, 1977. This Court bifurcated the action into two phases, Phase I (Liability) and Phase II (Remedy) for purposes of trial. At the conclusion of the Plaintiff's evidence of Phase I, this Court found that the Plaintiffs had demonstrated a *prima facie* case of employment discrimination with regard to the transfer and employment of Black and Mexican-American city drivers into road driving positions; but, such activity by Roadway ceased on January 1, 1968. This Court also concluded that the dual seniority system effective under the collective bargaining agreement is bona fide and non-discriminatory.

12. The Defendants also rested their case in Phase I on April 20, 1977, and the Plaintiffs offered no rebuttal. At the conclusion of all the evidence in Phase I, this Court reiterated its findings concerning the cessation of discrimination on January 1, 1968, and that the dual seniority system was not unlawful. Phase II of the trial proceeded on April 21 and 22, 1977; October 28 and 31 and November 1, 1977; and April 18, 1978, on which date all parties rested their respective cases in Phase II. In total, the trial of this action encompassed 9 days during which 63 witnesses filled over 2,500 pages of testimony, and this Court admitted some 200 exhibits into evidence.

13. On November 19, 1981, this Court entered findings of fact and conclusions of law and a judgment. This Court's judgment awarded the following individuals over the road positions, based upon future availability, with a retroactive seniority date of March 19, 1971: Joe Bush; Willie Luckett; Juventino R. Molina; Thomas Salinas; Wilbert Maltie; Marcos Melchor; James Earl Phipps; Webster Henderson; Carl Owens; and Eddie Lee Andrews. The judgment also awarded attorney's fees to Class Counsel Stuart Nelkin in the amount of $106,800.00 plus reasonable expenses in the amount of $3,292.27, and Warren Weir the amount of $91,530.00 in attorney's fees plus reasonable expenses in the amount of $4,459.64. This Court's judgment denied back-pay based upon a finding that the evidence adduced at trial failed to demonstrate any quanifiable way and means by which back-pay could be awarded to these individuals and based upon the absence of any equitable reasons to make such award.

14. Following entry of judgment by this Court on November 19, 1981, notices of appeal were filed by the Plaintiffs' Class, certain of the individually Named Plaintiffs and members of Plaintiffs' Class. Roadway filed a cross-appeal. On July 16, 1984, the Fifth Circuit Court of Appeals vacated the judgment of this Court, remanded this action, and ordered each party to bear its own cost on appeal. *Salinas, et al. v. Roadway Express, Inc., et al.*, 734 F.2d 1574 (5th Cir. 1984).

15. In its opinion of July 16, 1984, remanding this action, the Fifth Circuit held, *inter alia*: that this Court, in establishing January 1, 1968, as the cut-off date for class membership, had selected said cut-off date without

making sufficient findings of fact to support the conclusion as required by Rule 52(a), Federal Rules of Civil Procedure; that this Court had erred in denying back-pay relief to class members entitled to remedial relief; that relief was improperly limited to class members making inquiry about placement and road driver positions; that George Salazar had properly been denied intervention; and that Chester Torry was not precluded from the Consent Decree in *United States of America v. Roadway Express, Inc.;* and, that this court had correctly determined that the dual seniority system contained in the Collective Bargaining Agreement relative to city and road drivers did not violate Title VII. Because of its remand for this Court to "indicate, with specificity, the factual basis" regarding the January 1, 1968, cut-off date, the Fifth Circuit did not reach Roadway's argument that the claims advanced by the Plaintiffs were barred by the applicable statutes of limitation.

16. Following the Fifth Circuit's remand, Roadway contacted counsel for the Plaintiffs' Class and counsel for certain of the individually Named Plaintiffs and known members of Plaintiffs' Class in August of 1984 and proposed a meeting for the purpose of exploring the possible settlement of this litigation.

17. On September 6, 1984, Roadway met in Houston, Texas, with class counsel Nelkin and Weir and with counsel for certain of the individually Named Plaintiffs' and members of Plaintiffs' Class, Carnegie H. Mims, Jr., and Richard B. Fields to explore settlement. At the outset of this meeting it was agreed that there would be no negotiations regarding attorney's fees to be paid class counsel or counsel for any of the individually Named

Plaintiffs or known members of Plaintiffs' Class until the amount of the proposed back-pay settlement fund for the class had been agreed to and permission to negotiate on attorney's fees was obtained from this Court. Roadway stated that it wanted absolute confidentiality in the settlement, and it wanted to provide only monetary relief. No monetary settlement amounts were proposed by any of the parties and they agreed to meet again and exchange monetary settlement amounts.

18. On October 15, 1985, Roadway met in Houston, Texas, with Class Counsel Nelkin and Weir, and with counsel for certain of the Named Plaintiffs and known members of Plaintiffs' Class, Mims, and Fields. At the outset Roadway again reiterated its insistance that any agreement be predicated upon confidentiality with regard to its specific terms relating to monetary sums to be paid. With regard to the establishment of a back-pay fund, Roadway made an initial offer in the amount set forth in Defendant's Exhibit 1 explaining the method by which it had been calculated and determined. The parties then recessed. During this recess, Counsel Mims and Fields consulted with certain of the class members who were in attendance outside the negotiations. Following this recess, the parties reconvened, Nelkin, Weir, Mims and Fields rejected the proposed back-pay settlement fund made by Roadway questioning the method at which it had been arrived and then making a counter-proposal for an amount four times larger than the amount offered by Roadway. Roadway rejected this proposal and the meeting ended.

19. The parties again met to negotiate concerning a proposed settlement on November 1, 1984, in Houston, Texas. In attendance were Roadway, Class Counsel Weir

and Nelkin, and Counsel for certain of the individually Named Plaintiffs and known members of the Plaintiffs' Class, Mims and Fields. At the beginning of this meeting, Roadway tendered a new proposal concerning the amount of a proposed back-pay fund which is set forth on Defendant's Exhibit 2. Roadway explained the basis for the new proposal and addressed the prior objections made by opposing counsel to the prior proposal set forth in Defendant's Exhibit 1.

20. Following an explanation of its new proposal for creation of the back-pay fund on November 1, 1984, the parties recessed and Mims and Fields conferred with certain of the class members who were in attendance outside the negotiations. Following this consultation the parties reconvened at which time Nelkin, Weir, Mims and Fields stated that they concurred with the methodology utilized by Roadway in computing the amount but disagreed with the factor utilized by Roadway relating to the number of vacancies. They then made a counter-proposal to Roadway in an amount twice as much greater than that proposed by Roadway.

21. Roadway rejected the counter-proposal made by Counsel for the Plaintiffs' Class and Counsel for certain of the individually Named Plaintiffs and known members of Plaintiffs' Class and negotiations came to an end and the parties prepared for a hearing scheduled before this Court for November 15, 1985.

22. On November 9, 1985, Mims contacted Roadway and made another proposal in an amount half way between the amounts the two parties proposed at the meeting of November 1, 1985. Roadway rejected this counter-proposal and emphasized that it had made its final

proposal as set forth on Defendant's Exhibit 2. Shortly before the hearing was to commence before this Court on November 15, 1985, counsel for the Plaintiffs advised Roadway that it would accept the back-pay settlement fund proposed in Defendant's Exhibit 2. The parties then appeared before this Court in-chambers and announced the terms of the proposed settlement on the record. During this conference, a disagreement arose between the parties concerning Roadway's position that the proposed back-pay settlement fund would be contingent upon counsel for the various Plaintiffs and Roadway coming to an acceptable resolution concerning the amount of attorney's fees to be paid. Counsel for the various Plaintiffs were adamant in their rejection of Roadway's position concerning the contingency of the back-pay settlement fund upon resolution of the attorney's fees issue because of their concern that it might have the appearance of a conflict between their position on attorney's fees and that of class and their respective clients. After a brief recess, Roadway agreed to go forward with the proposed settlement, leaving any disputes as to the amount of attorney's fees to be negotiated to the determination of this Court.

23. Roadway thereafter commenced preparation of a proposed Consent Decree which after numerous drafts was forwarded to opposing counsel for their review under cover dated January 11, 1985. A meeting was also scheduled between the respective attorneys in San Antonio, Texas, on January 22, 1985, to begin review of the first draft of the proposed Consent Decree.

24. By correspondence dated January 17, 1985, Counsel for Union Defendants International confirmed that

they would be unable to attend the meeting scheduled for January 22, 1985, and advised Roadway and counsel for the Plaintiffs of their concerns relative to the proposed reassignment provisions.

25. Likewise, by letter dated January 18, 1985, counsel for Defendant Locals 657 and 988 advised of his inability to attend the meeting on January 22, 1985, and set forth some 15 separate objections to the proposed Consent Decree.

26. On January 22, 1985, counsel for Roadway and Class Counsel Nelkin and Weir, together with counsel for certain of the individually Named Plaintiffs and known members of Plaintiffs' Class, Mims and Adams met in San Antonio, Texas, to review the first draft of the proposed Consent Decree. In this meeting the parties discussed the proposed notice provisions, reviewed the written comments from counsel for the Union Defendants Class Counsel Nelkin's concerns that the complaint was proposed to be dismissed with prejudice, references to the Consent Decree entered by the Court in *United States of America v. Roadway Express, Inc.*, the definition of the Plaintiffs' Class, Roadway requests that it obtain all records relating to this case from all parties, including counsel for the Plaintiffs, the proposed allocation of the back-pay settlement amount, the proposed transfer provisions and the status of the Decree entered by the Court in *Sabala,* and the proposed confidentiality provisions.

27. On February 7, 1985, counsel for Locals 657 and 988 communicated the displeasure of said Defendants with the first draft of the proposed Consent Decree as not reflecting their previously stated positions. Counsel for Locals 657 and 988 also emphasized his displeasure

with the negotiations and that Roadway was not going to squeeze these Defendants into an agreement which was unacceptable.

28. Also on February 7, 1985, Class Counsel Nelkin communicated to Roadway several questions regarding the language contained in the second draft of the proposed decree. Specifically, class counsel Nelkin stated his opposition to the liquidated damages provisions of the confidentiality agreements and the proposed language providing Roadway with the right to withdraw consent from approval of the Decree under certain circumstances. Class Counsel Weir also communicated with counsel for Roadway on February 7, 1985, regarding the applicability of certain of the proposed transfer positions to Frank Morales.

29. By correspondence dated February 7, 1985, Class Counsel Nelkin advised counsel for Roadway that he and Class Counsel Weir objected to two portions of the second draft of the proposed decree. Specifically, Class Counsel objected to the liquidated damages provisions in the event of a violation of the Decree's confidentiality provisions and the right of Roadway to unilaterally withdraw from the Decree at any date later than provisional approval of the Decree.

30. By correspondence dated February 8, 1985, Counsel for the Defendant International sent a letter confirming his prior communication with counsel for Roadway concerning his client's questions about the second draft of the proposed Consent Decree. Specifically, counsel for the Defendant International expressed concern regarding the extension of job rights beyond the areas within the jurisdiction of the Defendant Locals 657 and 988.

Further, counsel for Locals 657 and 988 reiterating the objections expressed in his letter of January 18, 1984.

31. By correspondence dated February 11, 1985, counsel for Roadway forwarded a second draft of the proposed Consent Decree to the Court for review outlining the six areas of disagreement between the parties.

32. On February 14, 1985, a conference was held by the parties to discuss proposed changes and modifications to the second draft of the proposed Decree. In attendance at this meeting were counsel for Roadway. Class Counsel Weir and Nelkin, counsel for certain of the individually Named Plaintiffs and known members of Plaintiffs' Class, Mims and Adams together with counsel for Union Defendants.

33. By correspondence dated February 25, 1985. Roadway forwarded a third draft of a proposed Consent Decree to the parties incorporating changes which had resulted from the conference held on February 14, 1985. On February 20, 21, and 22 there were various conversations and discussions by telephone between Roadway and Class Counsel, counsel for the individually Named Plaintiffs and known members of Plaintiffs' Class and counsel for the Union Defendants regarding the proposed reassignment provisions to be contained in the proposed Decree.

34. By correspondence dated February 25, 1985, counsel for Roadway advised the Court that the parties had met on February 14, 1985, and reached an agreement as to all matters referred to in his correspondence on February 11, 1985, with the exception of the provisions relating to reassignment rights and that concerning conditions for appeal. With regard to matters relating

to transfer, the correspondence advised the Court that an agreement had been reached by all parties with the sole exception of counsel Mims.

35. By correspondence dated March 1, 1985, counsel for Locals 657 and 988 responded to the third draft of the proposed Consent Decree limiting his objections to the proposed reassignment provisions therein permitting retreat rights and the proposed confidentiality provisions of the Decree.

36. By correspondence dated March 5, 1985, counsel for Roadway forwarded a fourth draft of the parties proposed Consent Decree to the Court to review prior to the hearing on preliminary approval.

37. On March 8, 1985, counsel for Locals 657 and 988 advised counsel for Roadway of its objection and position relative to the inclusion of a provision in the reassignment and transfer area. In response, Roadway advised counsel for Locals 657 and 988 in a letter rejecting the proposal and asserting that it constituted a modification of what the parties had previously discussed and agreed to stating, "What is presently contained in the Consent Decree is what you and I discussed and agreed to—nothing else."

38. By correspondence dated March 12, 1985, counsel for Locals 657 and 988 advised counsel for Roadway that it was disappointed that said Defendant "has taken an adamant position concerning the insistence of Locals 657 and 988 with respect to protecting existing over-the-road employees from being adversely impacted by the grant of fictional seniority." In said correspondence, counsel for Locals 657 and 988 made an amended proposal concerning the provisions in question. Also, on March

12, 1985, counsel for Locals 657 and 988 advised this Court in correspondence advising that counsel for Roadways prior correspondence to the Court dated March 5, 1985, was incorrect in limiting outstanding objections to those being made by the Plaintiffs, outlining for the Court the objections of Locals 657 and 988.

39. By correspondence dated March 20, 1985, Roadway advised counsel for Locals 657 and 988 that his proposal contained in correspondence dated March 12, 1985, to counsel for Roadway was unacceptable. Further, the correspondence stated, "adamant is in the eyes of the beholder. You got exactly what you asked for as the language is presently drafted. Under the circumstances, your present proposal is nothing more than an attempt to secure something over and above what we previously agreed to." Counsel for Locals 657 and 988 responded to this correspondence by letter dated March 25, 1985 advising, "Regardless of our position, it stays the same."

40. By correspondence dated March 29, 1985, counsel for Roadway responded to the proposed modification of Locals 657 and 988 in the reassignment provisions set forth in correspondence dated March 12, 1985, and set forth a specific counter-proposal.

41. By correspondence dated April 2, 1985, class counsel Nelkin advised counsel for Roadway that, "I have consistently made it as clear as possible that I am not prepared to sign off on any consent decree which has an automatic forfeiture for class members who are found to have violated the Court's confidentiality order." Class counsel Nelkin went on to reiterate his suggested compromise contained in correspondence dated February 7, 1985, and stated that "If Roadway is unwilling to give

Judge Real any discretion in imposition for sanctions of contempt, I suggest we simply take the matter up with the Court. Once we have resolved this issue, I will be glad to address the other issues which remain outstanding."

42. By correspondence dated April 9, 1985, counsel for Roadway responded to Class Counsel Nelkin's correspondence dated April 2, 1985, expressing surprise and disappointment to Class Counsel Nelkin's problems with the proposed confidentiality provisions. Counsel for Roadway also expressed disappointment in Class Counsel's reference that there are "other issues which remain outstanding" in his April 2, 1985, letter.

43. On April 12, 1985, this Court held a hearing at which time Roadway announced that the parties had come to an agreement as to all provisions with the exception of Class Counsel Weir and Nelkin who continued to question the liquidation damages provision of the Decree. After the hearing was commenced, Class Counsel Weir and Nelkin withdrew their objection to the liquidated damages provision and they together with Roadway, Counsel for certain of the individually Named Plaintiffs and known members of the Plaintiffs' Class, jointly submitted the Decree for preliminary approval as to all provisions. The Decree was also approved by the Union Defendants as to certain specified provisions in the Decree. At the conclusion of the hearing, the Court granted preliminary approval and set a schedule for the sending of notices to the Plaintiffs' Class of the litigation, the date before which class members must opt-out, the date for the holding of a hearing to identify known members of Plaintiffs' Class, date notices of settlement was to be given, date for filing of objections to the proposed settle-

ment, the proposed and dated for the proposed fairness hearing.

44. At the conclusion of the hearing, Counsel Mims approached Roadway and advised that if Named Plaintiff Eddie Andrews could be reinstated he would not file an objection to the Decree and would not encourage others to similarly file objections. By correspondence dated April 25, 1985, Roadway rejected this request.

45. Following preliminary approval of the Decree on April 12, 1985, Roadway caused individual notice to be given pursuant to Section IV A (1) by sending certified mail, return receipt requested, a "Notice of Pending Class Action" and "Proof of Claim" to all identified members of the Plaintiffs' Class listed in Appendix 2 of the Decree. Pursuant to Section IV A (2) of the Decree, Roadway caused publication notice to be given to the public by publishing a "Notice of Pending Class Action" as set forth in Appendix 3 of the Decree in the following locations within the Southern Conference of Teamsters: San Antonio, Dallas, and Houston, Texas; Shreveport, Louisiana; Memphis, Nashville and Chattanooga, Tennessee; Meridian, Mississippi; Asheville, North Carolina; Atlanta and Valdosta, Georgia; Birmingham, Alabama; and Oklahoma City, Oklahoma. Nationally, Roadway gave publication notice in the Wall Street Journal. In connection the giving of publication notice, Roadway expended $23,391.49.

46. On June 21, 1985, Roadway filed a "Certification of Individual and Publication Notice" with this Court which identifies the names and addresses of the individuals to whom it mailed a "Notice of Pending Class Action" and "Proof of Claim" together with the names and loca-

tions of those publications in which it caused publication notice to be given.

47. Subsequent to Roadway causing individual and publication notice to be given of this pending class action, a "Proof of Claim" was filed with the Clerk of the Court by 141 individuals. On June 28, 1985, pursuant to the provisions of the Decree, and as specified in the individual and publication notices, this Court held a hearing for the purpose of determining the known members of Plaintiffs' Class. Following said hearing, this Court entered an Order dated June 28, 1985, in which it identified 122 individuals to be eligible for membership in this class and designating them as known members of the Plaintiffs' Class. This Court also approved the method and manner of providing notice of this pending class action as set forth in the "Certification of Individual and Publication Notice" filed by Roadway as complying with the provisions of the Decree and satisfying the requirements of due process in Rule 23 of the Federal Rules of Civil Procedure.

48. Following the hearing of June 28, 1985, pursuant to Section IV B (1) of the Decree, Roadway sent by certified mail, return receipt requested, a "Notice of Proposed Settlement of Class Action" to all known members of the Plaintiffs' Class identified in this Court's Order of June 28, 1985.

49. Pursuant to Section IV B (2) of the Decree, Roadway gave publication notice to the public and members of the Plaintiffs' Class of the Proposed Settlement by publishing a "Notice of Proposed Settlement of Class Action" as set forth in Appendix 5 of the Decree in newspapers in the following locations within the Southern

Conference of Teamsters: San Antonio, Dallas, and Houston, Texas; Shreveport, Louisiana; Memphis, Nashville and Chattanooga, Tennessee; Meridian, Mississippi; Asheville, North Carolina; Atlanta and Valdosta, Georgia; Birmingham, Alabama; and, Oklahoma City, Oklahoma. Nationally, Roadway gave publication notice in the Wall Street Journal. In connection with the giving of publication notice, Roadway expended $26,677.04.

50. On September 16, 1985, Roadway filed a "Certification of Individual and Publication Notice of Proposed Settlement" with this Court in which it identifies the individuals to whom it mailed the required "Notice of Proposed Settlement of Class Action" together with the names and locations of those publications in which it caused public notice to be given. Roadway complied with the provisions of the proposed Consent Decree and orders of this Court with regard to the method and manner in which it provided notice of the proposed settlement.

51. In response to the notices of the proposed settlement given by Roadway, 52 individuals have filed objections with the Court. The 52 objectors can be catagorized as follows: 42 are known members of the Plaintiffs' Class —or 34.4% (42 out of 122) of the known members of the Plaintiffs' Class; 4 out of the 43 known members of the Plaintiffs' Class are also Named Plaintiffs'—or 16.7% (4 out of 24) of the Named Plaintiffs; and, 10 are not known members of the Plaintiffs' Class.

52. There has been no suggestion that the Decree jointly proposed is the product of fraud or collusion. No such claim is advanced in any of the written objections filed with the Court or in the motion in opposition to the Decree filed by Larry Q. Evans on behalf of 25

individuals. In this regard, it is significant to note that counsel for 4 of the objectors, Richard B. Fields, participated in negotiations of the substantive portions of this Decree on behalf of Intervenor Chester Torry before his claim was resolved and his actions against Roadway were dismissed.

53. The absence of any such claim demonstrates the arms-length negotiations of the Decree. These negotiations spanned a period of some 8 months in which the parties exchanged numerous proposals and counter-proposals and met in face-to-face negotiations on at least 6 different occasions, including once in-chambers.

54. The conduct of Class Counsel during this process was consistently scrutinized by independent counsel for various members of the class who actively participated in the negotiations and have approved the Decree which they have jointly proposed to this Court for approval. Likewise, the reassignment provisions of the Decree are the product of the participation of the Union Defendants.

55. The proponents of the Decree were careful to avoid any appearance or suggestion of impropriety at the outset of negotiations by agreeing that there would be no negotiations regarding attorney's fees to be paid Class Counsel or Individual Counsel until the amount of the proposed back-pay settlement fund for the class had been agreed to and permission to negotiate on attorney's fees was obtained from this Court. As demonstrated by the record, the parties announced their agreement as to certain of the principal provisions, including the amount of the back-pay settlement fund and reassignment provisions, to the Court on November 15, 1984, and the Court authorized negotiations to proceed on the issue of attorney's fees.

56. This litigation has been pending for more than 14 years. A significant factor in this protraction has been the complexity of the legal and factual issues presented. The management of this litigation has been a major task which is inherent with an action encompassing the number of class members, geographical area, and time periods involved. This complexity was a factor in the Judicial Panel on Multi-District Litigation ordering this action be consolidated with other similar class actions against Roadway for proceedings before this Court.

57. The complexity of this litigation continues notwithstanding the conclusion of a trial on the merits and the entry of a judgment by this Court some four years ago. As a result of the Fifth Circuit's remand, additional proceedings, including evidentiary hearings before this Court, are contemplated. These proceedings will require the adducement of extensive evidence by the parties which could involve testimony from all 122 of the known members of Plaintiffs' Class in assessing their various claims to remedial relief.

58. Both sides of the docket have expended untold resources in the pursuit and defense of this litigation during the past 14 years with no end in sight for either side. If hearings are conducted on the individual claims, they could take months, perhaps years, to conclude. Thereafter, appeals could follow which could also result in another remand for additional proceedings. Because of the various locations within the geographical area encompassed within this action in which class members reside, they are also faced with significant out-of-pocket expenses just to attend and participate in the contemplated hearings, without regard to the costs and expenses to be incurred by legal counsel in presenting their claims.

59. The significant nature and extent of personal expense to the individual class members is demonstrated by the following comment contained in the objection of Eddie Lee Andrews to the proposed settlement:

> . . . during the 14½ (fourteen and a half) years I have been pursuing this case, my out of pocket expenses have exceeded $10,000 in loss of time, travel, meals, phone calls, meeting expenses.

60. Having completed an extensive trial on the merits and an appeal to the Fifth Circuit, the parties are in an excellent position to realistically appraise their relative positions on the merits and the benefits to be derived from the proposed settlement. Further, this Court has acquired extensive insight into this proceeding and the claims of the parties based upon its cumulative knowledge of the extensive evidence adduced during these 14 years of litigation. This knowledge includes a multitude of pretrial hearings; countless pleadings, depositions and documents; and 9 days of trial in which 63 witnesses filled over 2,500 pages of testimony with some 200 exhibits being admitted into evidence.

61. Recovery of the class at this course of the litigation is tied to the evidentiary record previously made before this Court in State I (Liability) of the Trial. As to State I (Liability), the Fifth Circuit's remand is not for a retrial or reopening of the record but merely an instruction to this Court that it articulate "with specificity" the "factual basis" for its determination that discrimination ceased on January 1, 1968 (735 F.2d 1574, 1579).

62. The evidence adduced by the Plaintiffs during trial demonstrated that the first Black applicant after January

1, 1968, for a road driving position in the Southern Area Conference was J. D. Monk. According to Monk's testimony, the first time he approached the terminal manager in Dallas concerning a road job after he became a regular city driver in 1967, he was hired, with a seniority date of May 2, 1969. (T., Vol. 1, pgs. 325, 336). The same is true with regard to the first Mexican-American who applied for a road driving position in the Southern Conference Area after January 1, 1968, Albert M. Cantu. According to Cantu's testimony, he was working as a casual for Roadway in San Antonio in September of 1969 when he approached an official at that terminal concerning obtaining a road position. Cantu was advised that there were no road openings in San Antonio and was encouraged by the Roadway official in San Antonio to go to Dallas to apply for a road job and he would "put in a good word for you" (T., Vol. 1, pgs. 85, 86, 87). Cantu thereafter went to Dallas in October of 1969 where he applied for a road job, but there were no vacancies and instead he was hired as a city driver with a seniority date of November 11, 1969. (T., Vol. 1, pgs. 86, 89 and 177) and this Court's discussion of Cantu, T. Vol. 3, pgs. 729, 730). Pursuant to the Consent Decree in *United States of America v. Roadway Express, Inc.*, Cantu signed up for a road job at the Dallas Terminal during the thirty (30) day period (October 1, 1970 through October 31, 1970) allotted in the Decree and thereafter received a job according to his city seniority and available vacancies on March 11, 1972 (T., Vol. 1, pgs. 87-90). Indeed, Cantu testified that he was not claiming that he had been the subject of any discriminatory treatment with regard to his application and pursuit of a road job with Roadway. (T., Vol. 1, p. 119).

63. It was only because of the Fifth Circuit's remand for this court to articulate the factual basis for the January 1, 1968, cutoff date that did not reach Roadway's argument that it was entitled to judgment under *United Airlines v. Evans,* 431 U.S. 553 (1977). Thus, continued litigation could result in denial of relief to all of the class members.

64. The Decree presented has been approved and proposed to this Court by Roadway, Class Counsel Weir and Nelkin, together with individual counsel for certain of the Named Plaintiffs, Mims, Adams and Sidney Ravkind as to all provisions, and by the Union Defendants as to certain of the provisions. The Decree is also supported by 20 of the 24 Named Plaintiffs (or 83.3%), 80 of the 122 known members of Plaintiffs' Class (or 65.6%), 21 of the 32 (or 65.6%) known members of Plaintiffs' Class in Group One and 59 of the 90 (or 65.6%) of the known members in Plaintiffs' Class in Group Two. Of the 42 known members of Plaintiffs Class who have filed objections, only 34 (or 28%) have challenged the sufficiency of the back-pay settlement. In view of the number of legal counsel involved, size of the Plaintiffs' Class, and the firmness of the positions of the respective parties over the past 14 years, this Decree is not only remarkable, but indicative of the fair, reasonable and adequate nature of the Decree.

65. The 54 objections filed with the Clerk of this Court to the Decre in response to the "Notice of Proposed Settlement of Class Action" can be summarized as falling into the following six substantive categories: (1) the insufficient amount of back-pay settlement; (2) computation of individual settlement amounts; (3) inadequacy

of counsel; (4) confidentiality provisions; and, (5) various miscellaneous concerns addressing primarily personal matters.

66. Only 34 (or 27.9%) of the objections filed by class members assert that the monetary amount to be awarded to them pursuant to Section VI of the Decree is insufficient. In each objection the class members base their entitlement to a larger monetary award by claiming that their settlement should equal the full amount they would recover if an award were made by the Court after conducting back-pay hearings.

67. With regard to the objections seeking monetary relief equal to the alleged back-pay settlement, it appears that the objecting class members have neglected to consider a back-pay cutoff date. If the date is, as this Court is previously determined, January 1, 1968, then no class member may be entitled to any relief. Furthermore, after hearing the Plaintiffs evidence at trial, this Court determined that only 10 members of the Plaintiffs' Class were eligible for any relief whatsoever. In view of the limited number of vacancies demonstrated in the record, the potential number of class members entitled to relief is certainly insufficient to accord full relief to all class members. The amounts allocated to the individuals awarded relief by this based upon a judicial finding of personal discrimination and their time, effort and expenses in this litiagtion. The amounts allocated to the Named Plaintiffs is based upon their time, effort and expense in this litigation.

68. Four of the objectors assert claims relating to the computation formerly utilized to reach their settlement amount. The formula utilized to compute back-pay en-

titlement to these individuals was based upon the number of months they were employed as a city driver with Roadway deducting certain periods when there were not actually working.

69. Two types of objections have been made with respect to the reassignment provisions contained in Section V of the Decree: (1) that retroactive seniority was not awarded to certain individuals; and, (2) that class members desiring to be road drivers were not immediately placed into such a position. Objections of this nature were made by 30 of the 122 known members of Plaintiffs' Class, or 24.5%

70. Those filing objections to the Decree failed to recognize the spirit of compromise with which the parties have entered into the settlement. With regard to the award of retroactive seniority, the parties specifically recognized that ". . . as a result of the present difficulty in identifying qualifications, present and past interest in accepting road driver positions, the sufficiency of making application and the difficulty in assessing facility of application together with identification of vacancies reasonably available to class members." (*See*, Section V A (1) of the Decree at p. 13.) This statement is applicable not only to the determination to award retroactive reassignment rights under the Decree, but also to the determination, in some circumstances, not to award retroactive reassignment rights to certain individuals. The cost to Roadway of affording the reassignment rights in Section V is approximately one fifth the amount of the back-pay settlement fund.

71. The determination of an individual class members appropriate retroactive road seniority date, if any, under

the formula set out in *Sagers v. Yellow Freight System*, 529 F.2d 721, 734 (5th Cir. 1976), would be extremely difficult. The document entitled "Appellants Motion in Opposition to Proposed Consent Decree" filed by attorney Larry Q. Evans on behalf of 25 of the objecting class members evidences this difficulty. (*See*: Motion in Opposition to Proposed Consent Decree, pgs. 4-5).

72. The very solution suggested in the opposition to the Decree filed by attorney Larry Q. Evans on behalf of 25 of the objecting class members demonstrates the appropriateness of the compromised contained in the Decree relative to certain reassignment rights. The very purpose of a compromise and settlement is to avoid the expense and delay of a trial on the merits. The compromise negotiated by the parties is a reasonable one to which only 28 class members have objected. Nothing in the nature of a Consent Decree mandates that retroactive seniority or transfer rights be accorded to all class members.

73. With regard to the objection of certain class members they were not awarded immediate placement in a road driver position, this is relief that the class is simply unable to obtain. Following the trial on the merits in April of 1977, this Court awarded road driver positions to certain class members. It did not award immediate placement because of displacement of innocent employees. The proper practice is to reassign class members to road driver positions as they become available.

74. Defendant Locals 657 and 988 are the only Teamster Locals having collective bargaining agreements with Roadway that are parties to this action. The Decree provides reassignment rights with retroactive seniority within the confines of the jurisdiction of Locals 657 and 988.

75. Three of the objectors advanced the alleged inadequacy of Class Counsel Weir and Nelkin in their written objections. Class Counsel Weir and Nelkin are well-qualified, experienced and more than generally able to conduct class litigation. In fact, a review of the objections addressing the adequacy representation by class counsel shows that counsel has not improperly or inadequately represented the interest of the class as a whole throughout this litigation and, particular, in the attempted settlement of it. Only 3 of the 122 known members of Plaintiffs' Class (or .025%) have advanced this claim. Further, this Court rejected these arguments when they were advanced on behalf of certain individual members of the class through Carnegie H. Mims, Jr., at the hearing on judgment in November of 1981.

76. Twenty of the objectors assert that Class Counsel Weir and Nelkin failed to consult with them in obtaining their authorization prior to approving the proposed settlement contained in the Decree. Because the client in a class action consists of numerous unnamed class members as well as the representatives, and because the class itself often speaks in several voices, it may not be possible for the class attorney to do more than act in what they believe to be the best interest of the class as a whole. A review of the substantive terms of the Decree demonstrates that it provides significant relief to the class.

77. Other objections contend that class counsel Nelkin did not meet with the class members to discuss the Decree until after it was filed by Class Counsel, and that class members were unable to contact Class Counsel. The evidence established that class members were made aware of the terms of the Decree with sufficient time to respond

to the Decree's provisions and that class members indeed had the opportunity to contact either the class attorneys or their staff. Class members consulted with Class Counsel at various times during the face-to-face negotiations with Roadway and had been in attendance during sessions of this Court concerning the proposed settlement.

78. Class members J. E. Phipps and A. L. Ward have filed objections to the entry of the Decree based upon the inadequacy of the representation of their private counsel, Mims. Like Class Counsel, Mims is qualified, experienced and able to conduct and review class litigation. With regard to the issue of whether his representation of certain individuals would necessitate the objection of the Decree, however, Mims is not held to such a standard.

79. The adequacy or inadequacy of counsel Mims representation of his personal clients has no bearing on the Court's approval of the Decree. The clients were free to release him and obtain new counsel any time they became dissatisfied with his representation.

80. Three of the objectors have lodged objections against the confidentiality provisions of the Decree. First, a general complaint concerning the need for confidentiality. Second, a complaint concerning the assessment of liquidated damages in an amount equal to the back-pay settlement received in the event of a breach of the confidentiality provisions.

81. The evidence adduced during the hearing demonstrated that concessions and compromises were made by all parties throughout the negotiations which culminated in the finalization of the Decree presently before this Court. From the outset of negotiations, Roadway has

premised this settlement upon a foundation of confidentiality which is memorialized in Section VII of the Decree. Neither objection made to the settlement Decrees confidentiality provision requires this rejection. The liquidated damages provisions tend to act as effective enforcer of the confidentiality provision itself. Absent the liquidated damage provision, the wholesale violation of the Decree is confidentiality requirement is not just possible, it is indeed very likely. The Decree provides that the liquidated damages are to be contributed to the National Association for the Advancement of colored People and League of United Latin American Citizens in equal amounts.

82. Roadway insisted upon the confidentiality provisions at the outset of negotiations. The confidentiality of the settlement amounts has substantial value to Roadway because of the damages that would be sustained by Roadway.

83. J. R. Carroll, A. C. Williams, and Eddie Lee Andrews have each claimed in their objections that Roadway is either currently discriminating or retaliating against them for their participation in this litigation. Williams and Andrews are Plaintiffs in a private action against Roadway styled *Williams v. Roadway Express, Inc.*, (United States District Court for the Southern District of Texas, Civil Action No. H-84-3792), and *Johnson v. Roadway Express, Inc.*, (United States District Court for the Southern District of Texas, Civil Action No. H-85-776). Each of these actions claims employment discrimination. Furthermore, such claims are not within the scope of the review of Roadway and the Union Defendants employment practices of this action. If any class member feels

he has right to explore appropriate avenues of addressing these claims as Williams and Andrews have.

84. Two non-members of the class, E. R. McGregor and R. P. Rodriguez, have filed objections stating their concern that the Decree does not affect rights they apparently have under the Consent Decree entered in *Sabala v. Western Gillette, Inc., et al.* This concern is specifically addressed in Section V of the Decree where it makes it its provisions subject to the executory provisions set forth in Section II (2) of the *Sabala* Consent Decree.

85. Antonio Moreno was included in Group One as a member of Plaintiffs' Class who filed a Proof of Claim and testified during the trial of this action. Accordingly, contrary to his written objection his back-pay settlement amount was computed on the basis of whole months, not half months as asserted. Moreno's objection to the exclusion of those months he was absent because of claims covered by workers compensation. This period of absence constitutes "extended sick leave" under Section VI C (3) of the Decree.

86. An individual notice regarding the pendency of this class action was mailed by Roadway to Gilbert H. Fernandez pursuant to the terms of the Decree. The United States Post Office gave notification of this certified mail notice on April 27, 1985, and on May 8, 1985. On May 12, 1985, the Post Office returned said notice to Roadway stamped "UNCLAIMED". (*See*, Roadway Exhibit 24, Fairness Hearing). Fernandez is employed at the Roadway Terminal in San Antonio, Texas, where other members of Plaintiffs' Class are employed. Publication notice of the pendency of this action was also given by Roadway in the San Antonio Express on April 25, 26, 1985.

87. Willie Jones did not become a city driver with Roadway until October 6, 1975, and therefore does not come within the definition of the Plaintiffs' Class in this action. (*See*: Roadway Exhibit 25, Fairness Hearing).

88. Nathan Morgan and James Simmons were not city drivers with Roadway between November 21, 1968, and June 2, 1975, and therefore do not come within the definition of the Plaintiffs' Class. (*See*: Roadway Exhibits 26 and 27, Fairness Hearing).

89. A total of 55 whole months was deducted from Charles E. Shelby's 183 whole months under the formula because of periods when he was either on lay-off, leave of absence or extended sick leave. (*See*: Roadway Exhibit 28, Fairness Hearing).

90. Chester Torry did not file a Proof of Claim as required in the notices of the pendency of this class action. Notification of the pendency of this class action was published in Memphis, Tennessee, on April 25, 26, 1985. Torry approved on May 1, 1985, an Order of Dismissal of his claims which was filed on June 28, 1985. This Court entered the approved Order on June 28, 1985. Therefore, Torry is not entitled to relief.

CONCLUSIONS OF LAW

1. Roadway is an employer within the meaning of Title VII and Defendants International, Southern Conference and Locals 657 and 988 are labor organizations within the meaning of Title VII.

2. The Plaintiffs and Plaintiffs' Class are employees within the meaning of Title VII.

3. This Court has jurisdiction over this action and all of the parties pursuant to the provisions of Title VII and 42 U.S.C. § 1981.

4. The manner and method of providing notice of this class action as set forth in the "Certification of Individual and Publication Notice of Pending Class Action" and in the "Certification of Individual and Publication Notice of Proposed Settlement of Class Action" complied with the provisions of the Decree and satisfy the requirements of due process and Rule 23 of the Federal Rules of Civil Procedure.

5. The Decree and all the terms thereof are fair, adequate and reasonable and comply and satisfy all applicable laws including Rule 23 of the Federal Rules of Civil Procedure. *Parker v. Anderson,* 667 F.2d 1204, 28 FEP Cases 788 (5th Cir. 1982); *Reed v. General Motors Corp.,* 703 F.2d 170, 32 FEP Cases 531 (5th Cir. 1983); *In Re Corrugated Container Antitrust Litigation,* 643 F.2d 195 (5th Cir. 1981); and, *Cotton v. Hinton,* 559 F.2d 1326, 15 FEP Cases 1342 (5th Cir. 1977).

6. It would be unlawful for this Court to enforce an agreement of the parties to award retroactive seniority rights beyond the jurisdiction limits of Locals 657 and 988 as to labor organizations that are not parties to this action and it would be unlawful for this Court to award retroactive seniority rights beyond the jurisdiction limits of Locals 657 and 988 as to labor organizations that are not parties to this action. *See, W.R. Grace & Co. v. Local 759,* 461 U.S. 757, 103 S. Ct. 2177, 31 FEP Cases 1409 (1983).

7. This Court has carefully reviewed and considered each and every objection and based upon the applicable law finds and concludes that each and every one is without foundation, ground or merit and insufficient to form a basis for rejection of the Decree.

8. To the extent that any of the foregoing conclusion of law constitute findings of fact they are hereby adopted as findings of fact. To the extent that any of the foregoing findings of fact constitute conclusions of law they are hereby adopted as conclusions of law.

9. To the extent that this Court has failed to articulate with specificity any fact finding necessary to support any of the foregoing conclusions of law, they are hereby deemed to be made in support of these conclusions and the Order Approving Proposed Consent Decree and Final Judgment signed and entered this date by this Court.

SIGNED and ENTERED this 4th day of November, 1985 at Los Angeles, CA.

/s/ MANUEL REAL
Manuel Real
United States District Judge

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

CIVIL ACTION NO. SA-71-CA-254

THOMAS SALINAS, et. al.,
Plaintiffs,

v.

ROADWAY EXPRESS, INC., et. al.,
Defendants.

CONSENT DECREE

April 12, 1985

SECTION I. *INTRODUCTION*

A. *Procedural Background*

This is an employment discrimination action which was commenced in the San Antonio Division of the Western District of Texas on September 17, 1971, alleging violations of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e), *et seq.*, as amended (hereinafter "Title VII"), and that portion of Section 2 of the Civil Rights Act of 1866 now codified under 42 U.S.C. § 1981 (hereinafter "Section 1981"). Specifically, the plaintiffs are Black and Mexican-American city drivers who allege that their employer, one of the defendants herein, Roadway Express, Inc. (hereinafter "Roadway"), and their

union, the Teamsters,[1] discriminated against them because of their race or national origin by maintaining separate or dual seniority systems in the collective bargaining agreements for city and road drivers; and that Roadway failed and/or refused to hire or reassign them into road driver jobs because of their race or national origin.

The Judicial Panel on Multi-District Litigation ordered that this action be consolidated with other similar pending actions against Roadway and the Teamsters for pretrial proceedings on November 6, 1974, pursuant to 28 U.S.C. § 1407 (R., Vol. III, Doc. No. 96). Following a hearing on May 1, 1975, this Court entered an Order on June 2, 1975, certifying the case *sub judice* as a class action under Rule 23, Fed. R. Civ. P., dismissing the consolidated actions and permitting the named plaintiffs in the dismissed actions to intervene herein. (R., Vol. III, Doc. 108). In the June 2, 1975, order, the class was defined as follows:

> All persons who have been reported by Roadway Express, Inc. to the Equal Employment Opportunity Commission as Negroes, Mexican-Americans and Spanish-Surnamed Americans, who do or did city driving for Roadway Express, Inc. at any time from November 21, 1968, until the present time, within the territory covered by the Southern Conference of Teamsters Supplemental Agreement to the National Master Freight Agreement. . . .

(R., Vol. III, Doc. 108, p. 3).

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1. As used herein, "Teamsters" refers to the Defendants International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America; Locals 657 and 988 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America; and the Southern Conference of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America.

After some five and one-half (5 and ½) years of extensive discovery, trial of this action commenced on April 18, 1977.[2] The Court bifurcated this action into two phases, Phase I (liability) and Phase II (remedy), for purposes of trial. At the conclusion of the plaintiffs' evidence in Phase I on April 20, 1977, the Court responded to motions for directed verdict by the defendants with certain findings of fact and conclusions of law including, *inter alia,* that the dual seniority system was not unlawful,[3] and, that since January 1, 1968, Roadway had not engaged in discriminatory conduct with regard to the reassignment and employment of Black or Mexican-American city drivers into road driving positions. (T., Vol. 3, pgs. 722, 726, 740, 741).

The defendants also rested their case in Phase I on April 20, 1977 (T., Vol. 3, pgs. 828, 857, 877), and the plaintiffs offered no rebuttal. (T., Vol. 3, p. 882). At the conclusion of all the evidence in Phase I, the Court reiterated its findings concerning the cessation of discrimination on January 1, 1968, and that the dual seniority system was not unlawful. (T., Vol. 3, p. 896). Based upon its finding that the dual seniority system was not unlawful, the Court dismissed all claims against the Teamsters and retained them in the litigation as Rule 19 Defendants. Phase II of the trial proceeded on April 21 and 22, 1977; October 28 and 31, 1977; November 1,

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2. Upon commencing trial, this Court dismissed Atlanta, Georgia employees from the class as defined in its June 2, 1975 order based upon the remedial relief afforded in *Bing v. Roadway Express, Inc.*, 444 F.2d 687 (5th Cir. 1971).

3. The dual seniority system in the case *sub judice* is the same one that was upheld in *Teamsters v. United States,* 431 U.S. 324 (1977). *See*: *Salinas v. Roadway Express, Inc., et al.,* 735 F.2d 1574, 35 FEP 533, 538 (5th Cir. 1984).

1977; and April 18, 1978, on which date all parties rested their respective cases in Phase II.

A hearing on judgment was held on March 23, 1981, and the Court entered findings of fact, conclusions of law and a judgment on May 5, 1981. (R., Vol. X, Docs. 311 and 312). Following the filing of motions to alter and/or amend judgment by the defendants, a second hearing on judgment was held on September 23, 1981, and findings of fact, conclusions of law and a judgment were entered by the Court on November 19, 1981. (R., Vol. X, Docs. 318 and 319). Plaintiffs were awarded attorney's fees and costs against Roadway.[4]

Notices of appeal were thereafter filed by certain of the individually named plaintiffs and members of plaintiffs' class.[5] The plaintiffs' class thereafter filed a notice of appeal and Roadway filed a cross-appeal. On July 16, 1984, the Fifth Circuit Court of Appeals vacated the judgment of this Court, remanded this action, and ordered each party to bear its own costs on appeal. *See, Salinas, et al., v. Roadway Express, Inc., et al.,* 734 F.2d 1574, 35 FEP 533 (5th Cir. 1984).[6] None of the parties sought

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4. Class counsel Stuart M. Nelkin was awarded $106,800.00 in attorney's fees and $3,292.27 for costs; class counsel Warren Weir was awarded $91,530.00 in attorney's fees and $4,459.64 for costs; and, Mandell & Wright was awarded $6,060.00 as attorneys fees and $674.86 for costs.

5. At the November 19, 1981, hearing on Judgment Carnegie H. Mims, Jr., entered an appearance on behalf of certain of the named plaintiffs and individual members of plaintiffs' class.

6. The Fifth Circuit held, *inter alia*: that this Court, in establishing January 1, 1968, as the cut-off date for class membership, had selected said cut-off date without making sufficient findings of fact to support its conclusion; that this Court erred in denying back-pay relief to class members entitled to remedial relief; that relief was improperly limited to class members making inquiry about placement in road driver positions; that George Salazar had properly been

review of the Fifth Circuit's decision and, upon remand, a hearing was scheduled for November 16, 1984, at which time it was announced that an agreement had been reached to fully settle, compromise and/or resolve this action and present this Consent Decree (hereinafter referred to as "this Decree") for the Court's approval.

B. *Purpose of Decree.*

The plaintiffs, plaintiffs' class and defendants, being desirous of resolving this action by an appropriate decree and without incurring the time, expense and uncertainty of the outcome of further contested litigation, agree that this Court has jurisdiction over the issues before it involving certain past and current employment practices of Roadway (within the territory covered by the Southern Conference of Teamsters Supplemental Agreement to the National Freight Agreement) insofar as those practices involve the hiring and/or reassignment and/or promotion of Black and Mexican-American city drivers into the position of road driver, and insofar as these practices involve the dual seniority provisions of the collective bargaining agreements between Roadway and the Teamsters as to these positions.

This Decree, being entered into with the consent of plaintiffs, plaintiffs' class, defendants and the Court, shall

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denied intervention; that Chester Torry was not precluded from intervention by the consent decree in *United States of America v. Roadway Express, Inc.*, Case No. C-68-321; and, that this Court had correctly determined Roadway's dual seniority system between city drivers and road drivers did not violate Title VII. Because of its remand for the articulation of specific findings of fact regarding the January 1, 1968, cut-off date found by this Court, the Fifth Circuit did not reach Roadway's argument that the claims advanced by the plaintiffs were barred by limitations.

in no manner be admissible in any proceeding as evidence of, or be construed as an admission by defendants of any violation of, failure to comply with, interference with, or obstruction of compliance with Title VII, Section 1981, Executive Order 11246, any applicable state or local fair employment practice law and/or ordinance, regulations promulgated under such laws and/or regulations and/or executive order and/or the consent decree entered on September 1, 1970, in *United States of America v. Roadway Express, Inc.*, Case No. C-68-321 in the United States District Court for the Northern District of Ohio, Eastern Division (hereinafter referred to as "the 1970 Decree").

This Decree is final and binding upon plaintiffs; plaintiffs' class collectively, and each and every member thereof individually; defendant Roadway; the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America; the Southern Conference of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America; Local 657 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America (hereinafter referred to as "Teamsters Local 657"); Local 988 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, (hereinafter referred to as "Teamsters Local 988"); and the respective heirs, successors and assigns of all of the aforestated parties. Except as specifically set forth herein, this Decree extends to and finally concludes all claims of race and/or national origin discrimination alleged to have occurred at any time prior to the final approval of this Decree and/or the continuing effects of same that have been asserted or could have been asserted by the named plaintiffs for them-

selves and/or on behalf of the plaintiffs' class as defined herein within the scope of *Salinas et. al. v. Roadway Express, Inc., et. al.,* Civil Action No. SA-71-CA-254, pending in the Western District of Texas, San Antonio Division. Upon final Court approval of this Decree, plaintiffs' complaint and/or supplemental and/or amended complaints shall be dismissed, with prejudice, with court costs to be paid by defendant Roadway. The Court shall maintain continuing limited jurisdiction only for the specific purposes set forth herein. The doctrines of res judicata and collateral estoppel shall apply to plaintiffs and plaintiffs' class, both collectively and individually, with regard to all such claims and matters.

In consideration of the foregoing and it having been determined that notice of this Decree has been properly given to all members of the class in accordance with all applicable law including Rule 23, Fed. R. Civ. P.; and that adequate opportunity to be heard has been given, and there being no valid objections to the entry of this Decree; it is therefore ORDERED, ADJUDGED and DECREED, as follows:

SECTION II. *DEFINITIONS*

A. *Road Driver*—As used in this Decree, a road driver is an individual employed by Roadway who primarily performs the duties of a driver between cities, is compensated on a per mile basis as established by the governing collective bargaining agreement, and maintains seniority status separate from that of a city driver.

B. *City Driver*—As used in this Decree, a city driver is an individual employed by Roadway who primarily performs the duties of a driver within the metropolitan area

of the city where said employee is employed, is compensated on an hourly basis as established by the governing collective bargaining agreement, and maintains seniority status separate from that of a road driver.

C. *Plaintiffs' Class*—Plaintiffs' class consists of the named plaintiffs as hereinafter defined and all other Blacks, Mexican-Americans and Spanish-Surnamed Americans (and/or their heirs, estates or duly designated guardians), who were city drivers for Roadway at any time between November 21, 1968, and June 2, 1975, at locations within the territory covered by the Southern Conference of Teamsters Supplemental Agreement to the National Master Freight Agreement, excluding the City of Atlanta, Georgia.

D. *Named Plaintiffs*—As used in this Decree, the named plaintiffs are the following individuals (and/or their heirs, estates or duly designated guardians): Thomas Salinas; Willie L. Luckett; Eddie Doxie; Agapito De La Rosa; Frank U. Morales; Raul C. Ramos; Tony Ochoa; Robert J. Lewis; Marcos Melchor; Joe De Luna; John Olivo, Jr.; Allen Cooper; Ernest R. Vargas; Carl Owens; Edd Smith; Eddie Lee Andrews; Joe H. Bush; Wilbert Maltie; Webster Henderson, Curtis Marbury; Lee Burks; Clinton Washington; John Jasper Ollie; and Lynn Jefferson.

E. *Territory Covered by the Southern Conference of Teamsters*—Roadway locations within the States of Alabama, Arkansas, Louisiana, Florida, Georgia, Mississippi, Tennessee, Texas, Oklahoma, and North Carolina, covered by the Southern Conference of Teamsters Supplemental Agreement to the National Master Freight Agreement.

F. *Proof of Claim*—As used in this Decree, a Proof of Claim is that form referred to and to be enclosed with Appendix 1.

SECTION III. *GENERAL PROVISIONS*

A. *Effect on Collective Bargaining Agreements*—Except as provided in Sections V A (2), V A (3), V B and VI B herein, this Decree shall not be interpreted as requiring the abandonment or modification of any provisions of the various collective bargaining agreements by and between and/or applicable to Roadway; International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America; Southern Conference of Teamsters; Teamsters Local 657; and Teamsters Local 988. With respect to the remaining provisions contained in Section V hereof not otherwise specifically identified in the next preceding sentence, the Teamsters neither approve nor disapprove such remaining provisions since such remaining provisions deal exclusively with Roadway's managerial perogative to fill new job vacancies as they occur throughout the territory covered by the Southern Conference of Teamsters.

B. *1970 Decree*—The communication and implementation of the systems and procedures prescribed in the 1970 Decree, which is in effect in the territory covered by the Southern Conference of Teamsters, are incorporated herein by reference, and made a part hereof.

C. *Documentary Evidence*—For the reason that the confidentiality of the documentary evidence submitted in this action has substantial proprietary value to Roadway and the disclosure of such information could operate to the competitive disadvantage of Roadway and to the competitive advantage of others, upon the expiration of

the period for appeal of the entry of this Decree under Rule 4, Fed. R. App. Proc., or upon the conclusion of any appeal which does not result in the withdrawal of consent pursuant to Section IX of this Decree, whichever event occurs last, all documentary evidence offered and/or admitted in this action shall become the property of Roadway and may be removed from the Court by counsel for Roadway; provided, however, that all documentary evidence which must be retained by the Court shall be sealed records of the Court not available to the public or to any person without the express written approval of an officer of Roadway. Roadway shall retain all documents removed from the Court hereunder for a period of six years.

Counsel for the individually named plaintiffs, counsel for the plaintiffs' class and counsel for the Teamsters are *hereby permanently enjoined* to maintain the confidentiality of the originals and copies of all records and documents of defendant Roadway in their possession or under their control, including those obtained through discovery, which relate to or concern the practices and policies of Roadway at all times and shall not utilize, reveal, or otherwise disclose said records and/or documents unless agreed to by Roadway or upon order of the Court following notice to Roadway.

SECTION IV. *NOTICE PROVISIONS*

Notices to plaintiffs, all members of plaintiffs' class and the public shall be provided in the following manner:

A. *Notice to Plaintiffs' Class of Pending Action*

(1). *Individual Notice*—Notice of this action along with a Proof of Claim form as set forth in Appendix 1

shall be sent by certified mail, return receipt requested, to all individuals at the corresponding mailing address as listed in Appendix 2. Each individual notice shall be mailed not later than fifteen (15) days from the date of the Court's preliminary approval of this Decree.

(2). *Notice by Publication*—Roadway shall give notice of this action to potential members of plaintiffs' class by publication of a notice as set forth in Appendix 3 which shall be published at a size twice the usual column width in one daily, high circulation newspaper in the cities of San Antonio, Texas; Dallas, Texas; Houston, Texas; Shreveport, Louisiana; Memphis, Tennessee; Nashville, Tennessee; Chattanooga, Tennessee, Meridian, Mississippi; Asheville, North Carolina; Atlanta, Georgia; Birmingham, Alabama; Valdosta, Georgia; and Oklahoma City, Oklahoma. Also, said notice shall be published in *The Wall Street Journal* for national publication. Notice by publication shall begin within fifteen (15) calendar days of the Court's preliminary approval of this Decree. Said notice shall be published twice no more than five (5) days apart in each newspaper utilized.

B. *Notice to Plaintiffs' Class of Proposed Settlement*

(1). *Individual Notice*—Notice of this Decree as set forth in Appendix 4 shall be sent by certified mail, return receipt requested, to all known members of plaintiffs' class. Each individual notice shall be mailed not later than July 13, 1985.

(2). *Notice by Publication*—Roadway shall give notice of this Decree to the public, and members of plaintiffs' class by publication of a notice as set forth in Appendix 5 which shall be published at a size twice the usual

column width in one daily, high circulation newspaper in the cities of San Antonio, Texas; Dallas, Texas; Houston, Texas; Shreveport, Louisiana; Memphis, Tennessee; Nashville, Tennessee; Chattanooga, Tennessee; Meridian, Mississippi; Asheville, North Carolina; Atlanta, Georgia; Birmingham, Alabama; Valdosta, Georgia; and Oklahoma City, Oklahoma. Also, said notice shall be published in *The Wall Street Journal* for national publication. Notice by publication shall begin on July 13, 1985, or as soon thereafter as is practical. Said notice shall be published no more than five (5) days apart in each newspaper utilized.

C. *Responsibilities of Parties*—Roadway shall bear responsibility for giving said individual and publication notices, and shall pay the cost incident hereto. Roadway shall certify compliance with the notice provisions of this Decree as set forth in Section IV A and B hereof by sworn affidavit filed with the Court with copies to counsel for plaintiffs' class, appending thereto a roster of persons and their respective addresses to whom individual notices were sent, as well as copies of all publication notices.

After said notices have been provided, and the time limits for filing proof of claims and objections have expired, counsel for Roadway shall file a master list of individuals who have filed Proof of Claim forms with the Court, which list shall indicate: (a) the name of the claimant; (b) their address; (c) the number of months of back-pay eligibility; (d) whether said claimant is a Group One or Group Two claimant for entitlement purposes; and, (e) whether such claimant, if presently employed by Roadway as a city driver, desires reassignment to a road driver position.

SECTION V. *REASSIGNMENT PROVISIONS*

A. *Reassignments to Road Driver Positions*

(1). *Initial Reassignments with Retroactive Seniority*—The award of retroactive seniority herein constitutes a compromise in an effort to equitably approximate seniority entitlement as a result of the present difficulty in identifying qualifications, present and past interest in accepting road driver positions, the sufficiency of making application and the difficulty in assessing facility of application together with identification of vacancies reasonably available to class members.

Subject to the executory provisions set forth in Section II (2) of the consent decree entered by the Court in *Sabala v. Western Gillette, Inc., et al.,* in the United States District Court for the Southern District of Texas, Houston Division, Civil Action No. 71-H-961 (hereinafter referred to as "the Sabala Decree"), first being performed by Roadway, only to the extent said executory provisions otherwise impact upon the reassignment rights hereinafter set forth in this paragraph, the following named individuals who were afforded specific relief in the Court's judgment entered November 19, 1981, shall be afforded the opportunity to voluntarily reassign themselves, in company seniority date order, with a road driver seniority date of March 19, 1971, (each individual's company seniority date shall remain intact) to the first road driver position that becomes available at any road domicile at which either Teamsters Local 657 or Teamsters Local 988 is the duly designated collective bargaining agent for both road and city drivers: Joe H. Bush, Juventino R. Molina, Thomas Salinas, James E. Phipps, Webster Henderson, Carl Owens, and Eddie Lee Andrews.

Provided, however, that each such named individual must: (1) have filed a Proof of Claim form pursuant to the provisions of Section IV A (1) and, (2) be employed by Roadway as a city or road driver at such time as road driver openings become available for which each named individual is entitled to reassignment (if said individual has a pending grievance as to discharge they will be entitled to reassignment at such time as said grievance is upheld so long as they have otherwise timely accepted the Offer of Voluntary Reassignment). Roadway shall give written notice in the form prescribed in Appendix 6 of such openings to said individuals by certified mail, return receipt requested, with a copy of said notice to plaintiffs' class counsel and counsel for the Teamsters. In the event any such individual shall fail to accept an offer of reassignment in accordance with the instructions set forth in said written notice, then they will no longer be entitled to be reassigned pursuant to the provisions of this Decree into any other road driver position that subsequently becomes available.

(2). *Initial Reassignments without Retroactive Seniority*—Subject to the executory provisions set forth in Section II (2) of the *Sabala* Decree first being performed by Roadway, only to the extent said executory provisions otherwise impact upon the reassignment rights hereinafter set forth in this paragraph, the named individuals identified in the next preceding paragraph shall also have the right to be reassigned, in company seniority date order, to the first road driver position that becomes available at any road domicile within the territory covered by the Sonthern Conference of Teamsters. Provided, however, each such individual has not already failed to accept an offer of voluntary reassignment as provided in Section

V A (1) and, in addition must: (1) have filed a Proof of Claim form pursuant to the provisions of Section IV A (1) and, (2) be employed by Roadway as a city driver at such time as road driver openings become available for which each such individual is entitled to be reassigned (if said individual has a pending grievance as to discharge they will be entitled to reassignment at such time as said grievance is upheld so long as they have otherwise timely accepted the Offer of Voluntary Reassignment). At the time a road driver position(s) becomes available, Roadway will give written notice of said road driver position(s) to said individuals in the form prescribed in Appendix 7 by certified mail, return receipt requested, with a copy of said notice to plaintiffs' class counsel. Each individual who accepts an offer of reassignment to an available road driver position will be assigned a road driver seniority date as of the date the reassignment becomes effective; provided, however, the individual's company seniority date shall remain intact. The declination of an offer of voluntary reassignment pursuant to the provisions of this paragraph shall not serve to extinguish any such individual's reassignment rights as set forth in the next preceding paragraph.

(3). *Award of Retroactive Seniority to Certain Road Drivers*—Willie Luckett and Marcos Melchor were afforded specific relief in this Court's judgment entered on November 19, 1981, and are currently road drivers. On the date this Decree becomes final and non-appealable, said individuals shall be assigned a road driver seniority date of March 19, 1971; provided, however, each such individual's company seniority date shall remain intact.

(4). *Secondary Reassignments*—Subject to the executory provisions set forth in Section II (2) of the

Sabala Decree first being performed by Roadway, after each of the named individuals identified in Section V A (1) of this Decree has exhausted the right to reassignment to a road driver position pursuant to the provisions of Section V A (1) and (2) above, those named plaintiffs not otherwise covered by the provisions of Section V A (1) and those members of plaintiffs' class who have stated their intention for voluntary reassignment to a road driver position on their Proof of Claim form filed with the Court as provided for in Section IV A (1) hereof, shall have the right to reassignment, in company seniority date order, to the first road driver position(s) that becomes available at any road domicile within the territory covered by the Southern Conference of Teamsters. Provided, however, each such individual not otherwise afforded relief under Section V A must: (1) have filed a Proof of Claim form pursuant to the provisions of Section IV A (1) and, (2) be employed by Roadway as a city driver at such time as road driver openings become available for which each such individual is entitled to reassignment (if said individual has a pending grievance as to discharge they will be entitled to reassignment at such time as said grievance is upheld so long as they have otherwise timely accepted the Offer of Voluntary Reassignment). At the time a road driver position(s) becomes available, Roadway will give written notice of said road driver position(s) to said individuals in the form prescribed in Appendix 7 by certified mail, return receipt requested, with a copy of said notice to plaintiffs' class counsel. Each individual who accepts an offer of voluntary reassignment to an available road driver position will be assigned a road driver seniority date as of the date the reassignment becomes effective; provided, however, the individual's com-

pany seniority date shall remain intact. In the event any such individual shall fail to accept an offer of voluntary reassignment in accordance with the instructions set forth in said written notice, then they will no longer be entitled to reassignment pursuant to the provisions of this Decree into any other road driver position that subsequently becomes available.

B. *Retreat Rights from Road Driver to City Driver*

(1). *General Retreat Rights*—Any individual who accepts a reassignment to a road driver position pursuant to the provisions of Section V A (1), (2) or (4) hereof will have thirty (30) calendar days from the date their initial reassignment to a road driver position (any subsequent reassignment to a road driver position pursuant to the provisions of Section V A (1) following an exercise of reassignment rights pursuant to Section V A (2) shall not carry any general retreat rights as herein provided) becomes effective to return to their former city driver position with their original city driver seniority date intact; provided said reassignment is to a terminal at which either Teamsters Local 657 or Teamsters Local 988 is the duly designated collective bargaining representative for city drivers. Each such individual may exercise his retreat right by written notice to Roadway by form of notice attached hereto as Appendix 8, said notice to be sent certified mail, return receipt requested, and postmarked no later than thirty (30) calendar days from the effective date of such individual's reassignment to a road driver position.

(2). *Seniority Displacement Retreat Rights*—At such time as an individual is adversely displaced in seniority pursuant to the provisions of Section V A (1) or (3),

the following named individuals shall be permitted to retreat to their former city driver positions with their respective original city driver seniority date intact: Agapito De La Rosa, Ernest R. Vargas and Richard Wong. Provided, however, any such individual: (1) is employed by Roadway as a road driver at San Antonio at such time as the retreat right herein provided arises; and (2) has exercised retreat rights by written notice to Roadway by form of notice attached hereto as Appendix 9, said notice to be sent certified mail, return receipt requested, and postmarked no later than seven (7) calendar days from the date such retreat right arises. All such individuals electing to retreat to their former city driver positions shall do so in road driver seniority date order. The effective date of each individual's retreat to their former city driver positions shall be either (1) the date Roadway secures a replacement for the corresponding road driver position being vacated by each such individual; or (2) within fourteen (14) days from the postmarked date of such individuals election to retreat if no replacement for any such vacated road driver position is required by Roadway.

(3). *Special Retreat Rights*—Robert J. Lewis, Marcus Melchor and Frank U. Morales are named plaintiffs who are now road drivers with Roadway. Within thirty (30) calendar days from the date that this Decree becomes final and non-appealable, Robert J. Lewis, Marcus Melchor and Frank U. Morales shall have the right to retreat to their former city driver position with their original city driver seniority date intact. Each such individual may exercise his retreat right by written notice to Roadway by form of notice attached hereto as Appendix 8, said notice to be sent certified mail, return receipt requested, and postmarked no later than thirty

(30) calendar days from the effective date of the final entry of this Decree.

C. *Active Reassignment Period.*

The rights and obligations of the parties under this Section V shall remain in full force and effect for a period of five (5) years from the date this Decree becomes a final and non-appealable order, after which such rights and obligations shall fully extinguish.

SECTION VI. *BACK-PAY SETTLEMENTS*

A. *Payment of Back-Pay Settlements*—The back-pay settlement amounts as detailed in Appendix 10 shall be paid in the manner described herein upon the Court's final approval of this Decree and upon the expiration of the period for appeal described in Rule 4, Fed. R. App. Proc., or a final determination upon appeal affirming the entry of this Decree, whichever occurs later; provided, however, distribution of said back-pay settlement amounts in accordance with Section VI C of this Decree shall be expressly conditioned upon prior execution and delivery to Roadway both the Release and Agreement and Confidentiality Agreement, attached hereto as Appendices 11 and 12, respectively. In lieu of any rate of interest, statutory or otherwise, which might accrue on any amounts to be paid pursuant to this Decree, interest, at a rate of 10.5 percent per annum, will begin to accrue only on the back-pay settlement amounts upon the filing of a notice of appeal and will accrue at such rate until said appeal is dismissed or a decision upholding this Decree is issued by the Court of final review considering said appeal.

B. *Nature of Back-Pay Settlements*—The back-pay settlement payment amounts to be paid by Roadway do not constitute payment in full or in part of any claims for loss of actual damages, punitive damages, attorney's fees, costs and/or expenses allegedly due or for sums due for work performed pursuant to the terms of any collective bargaining agreement; rather they are for the express business purpose of resolving pending litigation without the time and expense of further contested litigation and as settlement of doubtful, disputed and contested claims for back-pay. The Teamsters have not participated in the negotiation of the aggregate back-pay settlement payment, the amount of attorney's fees or the apportionment of the back-pay settlement amounts as provided in Section V D herein. Once this Decree becomes final and non-appealable, the back-pay settlement amounts plus any accrued interest thereon shall constitute the sole and only source of payment by Roadway to the named plaintiffs and/or members of plaintiffs' class. Except for any employer matching F.I.C.A. contributions, Roadway's total exposure to the named plaintiffs and the plaintiffs' class for any and all monetary sums of every kind, nature and description is specifically limited to the total of the gross sums identified in Appendix 10, and each individual receiving a back-pay settlement payment shall be responsible for any and all expenses they have incurred, or may have to incur, in connection with their participation in this action any rights or benefits which have accrued, or may accrue to them hereunder, including but not limited to travel, lodging, meals and/or expenses relating to a reassignment and/or move from one location to another, and/or any wages and/or benefits, including without limitation, health, welfare, or pension benefit contributions under any applicable collective bargaining agreement.

C. *Determination of Eligibility and Amount of Back-Pay Settlement Payments.*—The named plaintiffs and all members of the plaintiffs' class who formally present a Proof of Claim to the Court on or before May 31, 1985, shall be eligible for a back-pay settlement payment to be determined as hereinafter set forth. Other members of the plaintiffs' class who did not, prior to May 31, 1985, formally present a Proof of Claim to the Court shall, if the Court determines prior to this order becoming a final and non-appealable order that they have satisfied the criteria for participation in the settlement, participate as if they have timely filed in the first instance.

Counsel for the individually named plaintiffs and the plaintiffs' class have agreed with Roadway upon a total gross settlement amount for the individuals named in the Court's judgment of November 19, 1981; a total gross settlement amount for the individually named plaintiffs not otherwise named in the Court's judgment of November 19, 1981; and a total gross settlement amount for the plaintiffs' class as set forth in Appendix 10. Subsequent to the Court's determination of the identities of those members of plaintiffs' class entitled to a back-pay settlement payment, Roadway and counsel for the named plaintiffs and plaintiffs' class shall prepare and file a joint motion with the Court for approval of the calculations of the individual amounts to be paid to the members of plaintiffs' class which shall be sealed by the Court. Roadway shall withhold from each individual back-pay settlement payment federal and F.I.C.A. tax in the following percentages: 20% federal income tax and 7.05% F.I.C.A. tax and such other amounts which Roadway is statutorily obligated to withhold pursuant to any applicable state and/or local income tax laws. Such amounts, less

the designated federal, state and local taxes, together with any accrued interest thereon constitute the total to be paid by Roadway to the individuals named in the Court's judgment of November 19, 1981, to the individually named plaintiffs not otherwise named in the Court's judgment of November 19, 1981, and to the plaintiffs' class, which amounts may vary according to the number of class members who are ultimately permitted to participate in receiving a back-pay settlement payment. The total and individual amounts payable to the individuals named in the Court's judgment of November 19, 1981, the named plaintiffs not otherwise named in the Court's judgment of November 19, 1981, and plaintiffs' class have been reviewed by the Court and are hereby determined to be fair, equitable, adequate and in compliance with the terms of this Decree. The individual amounts of back-pay settlement funds to be paid to individual named plaintiffs and individual members of plaintiffs' class are limited and attributable to the months from each individual's company seniority date to each individual's last whole month of employment immediately preceding their termination date, or the last whole month immediately preceding their date of initial reassignment to a road driver position (excluding months or part thereof on layoff, leave of absence and/or extended sick leave), or through December 31, 1984, whichever first occurred.

(1) *Individuals Afforded Specific Relief*—The following named individuals who were afforded specific relief in the Court's judgment entered November 19, 1981, Joe Bush, Willie Luckett, Juventino R. Molina, Thomas Salinas, Wilbert Malti, Marcos Melchor, James Earl Phipps, Webster Henderson, Carl Owens, and Eddie Lee Andrews are entitled to receive the designated individual gross

amount set forth in Appendix 10 in addition to their participation as a member of plaintiffs' class in the Gross Class Back-pay Settlement Amount under paragraph (3) hereof. The claims of such individuals are hereby determined to have a greater value than the claims of the named plaintiffs not identified above and a greater value than the claims of the members of the plaintiffs' class by reason of the fact that the above-named individuals have been previously recognized by this Court as being entitled to relief in this action, by reason of which they are equitably entitled to additional compensation in the form of an enhanced back-pay settlement amount. For each of these reasons the back-pay settlement amounts agreed upon for the plaintiffs afforded specific relief by the Court are deemed fair and equitable to said individuals, and their participation in the total amount of the back-pay settlement is deemed fair and equitable and in accordance with the terms of this Decree.

(2) *Named Plaintiffs*—Each of the individually named plaintiffs not identified in the next preceding paragraph, are entitled to receive the designated individual gross amount set forth in Appendix 10 in addition to their participation as a member of plaintiffs' class in the Gross Class Back-pay Settlement amount under paragraph (3) hereof. The claims of such individuals are hereby determined to have a greater value than the claims of the other members of the plaintiffs' class by reason of the fact that each such individual has expended substantial time and effort in the prosecution, preparation and presentation of this action both on their own behalf and on behalf of the members of the plaintiffs' class, by reason of which they are equitably entitled to additional compensation in the form of an enhanced back-pay settlement amount. For each of

these reasons the back-pay settlement amounts agreed upon for said individually named plaintiffs are deemed fair and equitable to said individuals, and their participation in the Gross Class Back-pay Settlement Amount under paragraph (3) hereof is deemed fair and equitable to the plaintiffs' class whom they represent and in accordance with the terms of this Decree.

(3) *Gross Class Back-pay Settlement Amount*—The total back-pay settlement amount (herein before and hereinafter "Gross Class Back-pay Settlement Amount") to be divided among each member of the plaintiffs' class deemed eligible to participate in the settlement shall be based upon: (1) the number of class members ultimately found eligible to participate in the Gross Class Back-pay Settlement Amount; and, (2) the number of units of participation assigned to each named plaintiff and to each member of the plaintiffs' class as hereinafter set forth.

For the purpose of determining the individual and total number of units of participation, the plaintiffs' class shall be divided into two groups as follows:

(a) *Group One* consists of those members of the plaintiffs' class who filed a Proof of Claim and testified during the trial of this action.

(b) *Group Two* consists of all other members of the plaintiffs' class who filed a Proof of Claim but did not testify during the trial of this action.

The individual and total units of participation for Group One shall be determined as follows:

(a) Each individual's units of participation shall be the number of whole months from said indivi-

dual's company seniority date to said individual's last whole month of employment immediately preceding their termination date, or the last whole month immediately preceding their date of initial reassignment to a road driver position (excluding months or parts thereof on lay-off, leave of absence and/or extended sick leave), or through December 31, 1984, whichever first occurred.

(b) The total number of units of participation for Group One shall be the sum of those units assigned to its individual members.

The individual and total number of units of participation for Group Two shall be determined as follows:

(a) Each individual's units of participation shall be one-half the number of whole months from said individual's company seniority date to said individual's last whole month of employment immediately preceding their termination date, or the last whole month immediately preceding their date of initial reassignment to a road driver position (excluding months or parts thereof on lay-off, leave of absence and/or extended sick leave), or through December 31, 1984, whichever first occurred.

(b) The total number of units of participation for Group Two shall consist of the sum of those units assigned to its individual members.

Upon consideration of the foregoing provisions for assigning units of participation, the Court finds that those members of the plaintiffs' class who fall within Group

One have been of material assistance in the presentation of the case and the identification of the issues included therein, and that they have expended substantial time, effort, and money in the timely pursuit of their claims by appearing and testifying during the trial of this action. Such factors entitle them to consideration greater than that to be given to those members of the plaintiffs' class included in Group Two. The Court therefore finds and determines that the foregoing method of allocating units of participation in the total back-pay settlement is fair, equitable, sufficient, adequate and accurate, and it is therefor approved.

That portion of the Gross Class Back-pay Settlement Amount which may be received by any member of the plaintiffs' class shall be uniformly determined by the following system:

(a) The value of each unit of participation is equal to the total amount of the back-pay settlement allocated to the plaintiffs' class divided by the total number of units of participation assigned Groups One and Two.

(b) Each individual's back-pay settlement amount shall then consist of the total number of units of participation assigned to him multiplied by the value assigned each unit of participation.

(4) *Court Approval*—The Court has reviewed the back-pay settlement amounts set forth in Appendix 10 and finds that both the total and method for determining the individual amounts are fair, equitable, adequate, sufficient and accurate. Upon payment by Roadway pursuant to this Court's prior approval of the net amounts to be

paid to the individual members of the plaintiffs' class, the obligation of Roadway to each of the individual members of the plaintiffs' class with regard to any back-pay settlement payments shall be deemed fully satisfied. The determination of the back-pay settlement amounts to be paid each member of the plaintiffs' class under this Decree is fair, equitable, sufficient and adequate as to each participating member of the plaintiffs' class, and it is therefore approved.

SECTION VII. *CONFIDENTIALITY PROVISIONS*

The individually named plaintiffs; all members of the plaintiffs' class who participate herein; counsel of record for all parties herein; all directors, officers, and employees of Roadway; representatives of the Southern Conference of Teamsters; representatives of Teamster Local 657; representatives of Teamster Local 988; and all persons in active concert or participation with them who receive actual notice of this Decree by personal service or otherwise are *hereby permanently enjoined* from disclosing the amounts of and basis for the back-pay settlement payment amounts and/or attorney's fees; costs and expenses which are the subject of this Decree, or the total thereof; the originals and all records and documents of defendant Roadway in the possession or control of counsel for individually named plaintiffs counsel for the plaintiffs' class and/or counsel for the Teamsters, including those obtained through discovery, which relate to or concern the practices and policies of Roadway, to any other person, with exception for the following disclosures, all of which are deemed by the Court to be reasonably necessary:

(1) The amounts of the back-pay settlement payments and/or attorney's fees, costs and expenses for the purpose of calculating and reporting taxable income, if any;

(2) The amounts and sources of, and basis for, the back-pay settlement payments and/or attorney's fees, costs and expenses for the purpose of complying with any order of a court to which a member of plaintiffs' class is subject, if any;

(3) The amounts of the back-pay settlement payment and/or attorney's fees, costs and expenses for the purpose of disclosing assets and liabilities on a financial statement for which a member of plaintiffs' class would otherwise be subject to criminal penalties or civil liability for false or incomplete disclosure, if any;

(4) The amounts of the back-pay settlement payments and/or attorney's fees, costs and expenses for the purpose of completing a petition in bankruptcy filed by a member of plaintiffs' class or on such member's behalf, if any;

(5) The amounts of the back-pay settlement payments and/or attorney's fees, costs and expenses for the purpose of complying with any other legal obligation directly attendant to a judicial proceeding to disclose such amount or amounts, if any;

(6) In the case of the members of the plaintiffs' class, the amounts of the back-pay settlement payments and/or attorney's fees, costs and expenses for the purpose of disclosing such amount to such per-

son's spouse, if any, who shall also be subject to the injunctive order contained in this Decree;

(7) The amounts and sources of, and basis for, the back-pay settlement payments and/or attorney's fees, costs and expenses for the purpose of discussing same with legal counsel, which counsel shall also be subject to the injunctive order contained in this Decree;

(8) With respect to counsel for any of the named plaintiffs and the plaintiffs' class, the amounts and sources of, and basis for, the back-pay settlement payments and/or attorney's fees, costs and expenses for the purpose of disclosing such information to their law firms, and their attorneys, accountants, pension and profit sharing trustees, bankers, and former partners, to the extent such former partners have been involved in this lawsuit, if any, which firms and members and/or employees thereof shall also be subject to the injunctive order contained in this Decree; and/or,

(9) With respect to counsel for Roadway, and the officers of Roadway who are privy to this Decree, the amounts and sources of, and basis for, the back-pay settlement payments and/or attorney's fees, costs and expenses for the purpose of disclosing the same to such officers and directors whose approval is necessary hereto and/or to the shareholders of Roadway, if required to do so by law.

Violation of the injunctive order contained herein would result in penalties being imposed for civil contempt upon

any individual found guilty of such violation; and, in the event that any member of the plaintiffs' class receiving a back-pay settlement payment hereunder is found by a preponderance of the evidence to be guilty of a willful disclosure in violation of the injunctive order contained herein, such person(s) would additionally be subject to the payment of liquidated damages equal to the amount of the back-pay settlement payment received by said individual, or in the event said back-pay settlement payment has not yet been received, then the amount of the back-pay settlement payment to which said individual will become entitled. All liquidated damages shall be paid to Roadway who shall in turn donate the full amount of all such proceeds to the National Association for the Advancement of Colored People and League of United Latin American Citizens in equal amounts; provided, however, that to the extent the costs and attorney's fees Roadway may expend prosecuting a violation of the injunctive order contained herein exceed fifty percent (50%) of the liquidated damages award, such excess fees and costs shall be paid by the individual member of plaintiffs' class found to be in violation of said injunctive order.

Appendices 10 and 13 shall be sealed records of the Court and shall not be available to the public or to any person except as directed in writing by an officer of Roadway and approved by the Court. Each recipient of a back-pay settlement payment shall be advised and have knowledge only of the amount they may receive individually, the amount of liquidated damages they are subject to, and the amount of the back-pay settlement payment that they actually received. The total amount of back-pay settlement payments shall be known only by

the Court; counsel for named plaintiffs and plaintiffs' class who are signatories hereto; and counsel, officers and directors of Roadway.

SECTION VIII. *ATTORNEY'S FEES, COSTS AND EXPENSES*

Pursuant to the statutes upon which this action is based, Roadway is additionally responsible for the payment of costs of suit and attorney's fees for counsel representing the named plaintiffs and the plaintiffs' class who are signatories hereto. If this action were not settled, the Court would determine such fees as a part of its final judgment.

Counsel for the individual plaintiffs and the plaintiffs' class who are signatories hereto have separately negotiated and settled the amount of their fees, costs and expenses of suit with defendant Roadway so that no deduction will be made from the settlement amount for the class or the individual named plaintiffs by reason of attorney's fees, costs or expenses of suit. Counsel for individual class members not signatory hereto who are retained through private arrangements shall be paid attorney's fees, costs and expenses, if any, directly from their client in accordance with any private fee arrangement between them and not from Roadway. The amount of settlement payments for attorney's fees, costs and expenses of suit is set forth in Appendix 13 and is to be paid under the same terms and conditions as set forth in Section VI of this Decree. In determining whether the amount of settlement payments for attorney's fees, costs and expenses of suit as set forth in Appendix 13 is fair and reasonable, the Court has considered all of the factors as outlined in *Johnson v. Georgia Highway Express, Inc.*,

488 F.2d 714, 7 FEP Cases 1 (5th Cir. 1974), as refined in subsequent decisions, *see, e.g., Copper Liquor v. Adolph Coors*, 648 F.2d 1087 (5th Cir. 1983) and *Graves v. Burnes*, 700 F.2d 220 (5th Cir. 1983), including:

(1) The time and labor required to be expended in the pursuit and conclusion of this action and all of the terms of this Decree;

(2) The novelty and difficulty of questions involved in this action;

(3) The skills requisite for the proper representation of the named plaintiffs and plaintiffs' class;

(4) That the amount of time expended in the representation of the named plaintiffs and the plaintiffs' class is sufficiently great that it has precluded employment of counsel in other matters;

(5) Prevailing rates for legal services for which contemporaneous payment is made;

(6) The amounts in controversy and the results obtained;

(7) The experience, reputation, and ability of counsel for the named plaintiffs and the plaintiffs' class; and,

(8) The fact that the recovery of any fee was contingent upon success.

Upon consideration of all these factors, the Court has determined that the agreed to settlement amount for attorney's fees, including costs and expenses of suit in this action, and for concluding all of the terms and con-

ditions of this Decree, is fair and reasonable and is hereby approved.

SECTION IX. *CONTINUING LIMITED JURISDICTION*

There being no just reason for delay, the entry of this Decree finally adjudicates all of the claims, rights and liabilities of all the parties and members of the plaintiffs' class and terminates this action with prejudice except the Court shall retain jurisdiction of this matter for the sole, express and limited purposes of: (1) enforcing and/or interpreting the terms of this Decree as previously set forth in Section VI hereof; (2) determining the eligibility of members of plaintiffs' class; (3) enforcing the provisions relating to reassignment to road driver positions and retreat provisions as set forth in Section V; (4) determining identities of members of plaintiffs' class as set forth in Section XI hereof; (5) resolving any and all disputes pertaining to the identities and/or interests, partnerships, corporations, creditors, heirs, administrators, executors or persons who may be, or claim to be, entitled to all or a portion of or interest in any settlement payments.

This case is hereby dismissed with prejudice as to those matters over which the Court does not retain jurisdiction; all parties to pay their respective court costs and expenses.

SECTION X. *CONDITIONS*

The consent of Roadway to this Decree may be unilaterally withdrawn within thirty (30) days following notice: (1) of intervention by any person as an additional party to this action; (2) that any member of the plaintiffs'

class is permitted to opt out of the class described herein; (3) that the total amount of the monetary settlement in this matter has been disclosed by individuals subject to the Court's injunction herein contained (other than directors, officers, employees, and attorneys for Roadway) and thereafter published or broadcast in any manner by a news agency, the news media, or any other person and/or entity. Roadway, the plaintiffs' class in its entirety or the Teamsters may unilaterally withdraw consent to this Decree within thirty (30) days following notice that the Court has rejected or made non-consentual, substantive modifications to any term or provision of this Decree. The right to withdraw from this Decree for any of the above stated reasons shall terminate at the conclusion of the period for appeal of this Decree under Rule 4, Fed. R. App. Proc., or until an appeal of this Decree is dismissed or a decision upholding this Decree is issued by the Court of final review, whichever last occurs.

SECTION XI. *COURT APPROVAL AND HEARING DATES*

To effectuate the procedural steps of this Decree, the Court hereby grants preliminary approval of same without expressing its opinion as to the merits of the proposal. Notice to plaintiffs' class of pending action shall be given as set forth in Section IV A hereof. A hearing will be held at June 28, 1985, at 10:00 a.m., 1985, to specifically identify known members of plaintiffs' class.

Notice to plaintiffs' class of proposed settlement shall be provided as set forth in Section IV B hereof. A fairness hearing will be held at August 30, 1985 at 10:00 a.m., 1985 to consider the fairness, adequacy and propriety

of the proposed settlement. Upon the conclusion of the fairness hearing the Court will either grant final approval to this Decree or deny approval. Final approval of this Decree will be granted, if at all, by separate order together with findings of fact and conclusions of law supporting same, subsequent to said fairness hearing.

Signed and entered at Los Angeles, California, on this 12th day of April, 1985.

/s/ MANUEL REAL
Manuel Real
United States District Judge

APPROVED AS TO ALL PROVISIONS:

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APPROVED ONLY AS TO SECTIONS V A (1), V A (3), V B, VI B, VII and X:

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Local 657 of the International Brotherhood of Teamsters

/s/ Signature Illegible
President

Local 988 of the International Brotherhood of Teamsters

/s/ Signature Illegible
President

APPENDIX E

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

CIVIL ACTION NO. SA-71-CA-254

THOMAS SALINAS, et al.,
Plaintiffs,

v.

ROADWAY EXPRESS, INC., et al.,
Defendants.

(Filed November 12, 1985)

ORDER APPROVING PROPOSED CONSENT DECREE AND FINAL JUDGMENT

On September 20, 1985, came on to be heard and considered the proposed Consent Decree (hereinafter "the Decree") which has been jointly filed and proposed by Defendant Roadway Express, Inc., Counsel for the Plaintiffs' Class and Counsel for certain of the individually Named Plaintiffs and known members of Plaintiffs' Class as to all provisions, and by the Defendants International Brotherhood of Teamsters, Southern Conference of Teamsters, and Locals 657 and 988 of the International Brotherhood of Teamsters; and it appearing that notice and service of the proposed settlement contained in the Decree has been made in accordance with the law and with the Orders of this Court relating thereto; and the Decree and Objections thereto having come on for hearing

and trial, and this Court having considered all the evidence adduced, the entire record in this proceeding, as well as the argument of counsel; and entered Findings of Fact and Conclusions of Law; it is hereby

ORDERED that the Decree as jointly submitted and filed with this Court is hereby APPROVED with the following modifications:

(a) The reference in Section III A, Page 9, line 8 from top, stating "Sections V A (2), V A (3), V B and VI B" changed to read "Sections V A (1), V A (3), V B and VI B";

(b) The reference in Section III C, page 10, line 5 from top, stating "pursuant to Section IX" changed to read "pursuant to Section X";

(c) The phrases in Section V A (1): "first road driver position that becomes available"; "as road driver openings become available"; and, "any other road driver position that subsequently becomes available"; and those in Section V A (2): "first road driver position that becomes available"; "as road driver openings become available"; "a road driver position(s) become available"; and, "an available road driver position"; and in Section V A (4): "first road driver position(s) that becomes available"; "as road driver openings become available"; "road driver position(s) becomes available"; "an available road driver position"; and "any other road driver position that subsequently becomes available"; all relate to new hire situations subject to the exclusive discretion and control of Roadway management that arise only after the Company has fully exhausted all of its contractual obligations, including, without limitation those relating to the reinstatement, recall, transfer or employment of existing drivers.

(d) The reference in Section V A (4), page 16, line 15 from top, stating "Section V A" changed to read "Section V A (1)";

(e) The reference in Section VI B, page 20, line 14 from top, stating "provided in Section V D herein" changed to read "provided in Sections VI and VIII herein";

(f) The Offer of Voluntary Reassignment to Road Driver Position attached under Appendix 6 replaced by Roadway Exhibit 6 from Fairness Hearing; and,

(g) The Offer of Voluntary Reassignment to Road Driver Position attached under Appendix 7 replaced by Roadway Exhibit 7 from Fairness Hearing.

It is further ORDERED that all of the objections received and/or filed with the Clerk of this Court, and those presented during the hearing and trial conducted by this Court to determine whether to approve or reject the proposed settlement contained in the Decree, are hereby DENIED; and,

It is further ORDERED that in accordance with the provisions of Section VI of the Decree, Defendant Roadway Express, Inc., shall pay to the individuals listed in Exhibit "1" of the Joint Motion for Approval of Individual Calculations of Back-Pay Settlement Amounts filed by Defendant Roadway Express, Inc., and Counsel for the Plaintiffs' Class and counsel for certain of the individually Named Plaintiffs and known members of Plaintiffs' Class, the sums set forth therein which were approved by Order of this Court dated June 28, 1985; and,

It is further ORDERED that the amounts listed on Exhibit "1" of the Joint Motion for Approval of Indi-

vidual Calculations of Back-Pay Settlement Amounts filed by Defendant Roadway Express, Inc., and Counsel for the Plaintiffs' Class and Counsel for certain of the individually Named Plaintiffs and known members of Plaintiffs' Class to be paid to the individuals listed thereon who are deceased shall be done in accordance with the provisions of Section VI of the Decree to their estates upon execution of both the "Release and Agreement" and "Confidentiality Agrement" attached as Appendices 11 and 12, respectively, to the Decree by the person and/or entity presenting documentary evidence of their capacity as approved and/or designated by the appropriate court having jurisdiction over the estate of the deceased;

It is further ORDERED that in accordance with the provisions of Section VIII of the Decree, Defendant Roadway Express, Inc., shall pay to Stuart Nelkin, Warren Weir, Sidney Ravkind, Carnegie H. Mims, Jr. and Oscar Adams, III, reasonable attorney's fees, costs and expenses of suit in the sums set forth on Appendix 13 of the Decree; and,

It is further ORDERED that Appendices 10 and 13 to the Decree shall continue to be sealed records of this Court in accordance with the provisions of Section VII of the Decree; and

It is further ORDERED that the following documents be sealed by the Clerk of this Court and not opened absent notice to the parties who have jointly submitted the Decree for approval through their respective counsel of record of the request to inspect same, said parties have had an opportunity to oppose or agree to same, and an order is thereafter entered by this Court:

(a) Exhibit "1" of the Joint Motion for Approval of Individual Back-Pay Settlement Amounts filed by Defendant Roadway Express, Inc., and Counsel for the Plaintiffs' Class and Counsel for certain of the individually Named Plaintiffs and known members of the Plaintiffs' Class;

(b) The following objections to the Decree received by the Clerk of this Court: Arthur Morris Johnson (received August 13, 1985); Joe H. Lopez (received August 14, 1985); George Earl Walker (received August 16, 1985); and copies sanitizing the dollar figures disclosed therein filed in their place;

(c) The "Appellants' Motion in Opposition to the Proposed Consent Decree" filed with the Clerk of this Court on August 14, 1985, by Larry Q. Evans of the law firm of Washington & Randle together with the attached objection of Willie Wheatley (dated August 1, 1985); and copies sanitizing the dollar figures disclosed therein filed in their place;

(d) The following exhibits which were introduced into evidence during the hearing and trial conducted before this Court to determine whether to approve or reject the proposed settlement contained in the Decree: Roadway Exhibits "3" and "4"; and,

(e) The transcript of the in-chambers conference with this Court on November 15, 1985.

It is further ORDERED that Defendant Roadway Express, Inc. is hereby released from the conditions and obligations required and set forth in its Supersedeas Bond which was approved by this Court on April 15, 1984; and,

It is further ORDERED that this Decree and its terms shall be binding upon all of the individuals identified on

Exhibit "3" of this Court's Order of June 28, 1985, as well as all members of Plaintiffs' Class who did not file a proof of claim and are not identified on Exhibit "3" of this Court's Order of June 28, 1985, with the exception of Raymond J. Lamotte and Willie Johnson who exercised their right to opt-out as members of the Plaintiffs' Class; and,

It is further ORDERED that each party is assessed their respective costs of court incurred.

SIGNED and ENTERED this 4th day of November, 1985, at Los Angeles, CA.

/s/ MANUEL REAL
Manuel Real
United States District Judge

MOTION FILED
JAN 20 1987

No. 86-1003 (3)

SUPREME COURT
OF THE
UNITED STATES

OCTOBER TERM, 1986

THOMAS SALINAS, ET. AL.,
PETITIONERS

V.

ROADWAY EXPRESS, INC.,
ET. AL., RESPONDENTS

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

MOTION TO ALLOW DAMAGES FOR DELAY

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RESPONDENT ROADWAY
EXPRESS, INC.

1987

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STATUTES AND RULES INVOLVED

28 U.S.C. §1912

Damages and costs on affirmance

Where a judgment is affirmed by the Supreme Court or a court of appeals, the court in its discretion may adjudge to the prevailing party just damages for his delay, and single or double costs.

Sup. Ct. Rule 17.

Considerations Governing Review on Certiorari

.1. A review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefore. The following while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

(a) When a federal court of appeals has rendered a decision in conflict with the decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or of a federal court of appeals.

(c) When a state court or a federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

.2. The same general considerations outlined above will control in respect of petitions for writs of certiorari to review judgments of the United States Court of Appeals for the Federal Circuit, tne United States Court of Military

Appeals, and of any other court whose judgments are reviewable by law on writ of certiorari.

Sup. Ct. Rule 49.

Interest and Damages

.1. Unless otherwise provided by law, if a judgment for money in a civil case is affirmed, whatever interest is allowed by law shall be payable from the date the judgment below was entered. If a judgment is modified or reversed with a direction that a judgment for money be entered below, the mandate shall contain instructions with respect to allowance of interest. Interest will be allowed at the same rate that similar judgments bear interest in the courts of the State where the judgment was entered or was directed to be entered.

.2. When an appeal or petition for writ of certiorari is frivolous, the Court may award the appellee or the respondent appropriate damages.

TO THE HONORABLE UNITED STATES SUPREME COURT:

Now comes Roadway Express, Inc., Respondent herein, and files this its Motion to Allow Damages for Delay, and in support thereof would show the Court the following:

STATEMENT OF THE CASE

The Petitioners are 34 out of 122 member of the Plaintiffs' Class in this protracted Title VII litigation. Unhappy with the Consent Decree approved by the District Court and the Fifth Circuit, these 34 Petitioners have further delayed the receipt of benefits under the Consent Decree to the remaining 88 members of the Plaintiffs' Class while interest mounts daily at the rate of 10.5% against Respondent Roadway Express, Inc.

On September 20, 1985, the United States District Court for the Western District of Texas conducted a fairness hearing with regard to the Consent Decree

proposed in the case sub judice. On November 4, 1985, the District Court entered an order approving the Consent Decree and entered Findings of Fact and Conclusions of Law in support thereof. The objectors to the Consent Decree, the Petitioners herein, appealed to the United States Court of Appeals for the Fifth Circuit alleging that the Consent Decree was not fair, reasonable nor adequate. In light of the overwhelming evidence to the contrary, the Fifth Circuit affirmed the District Court's order approving the Decree. Salinas v. Roadway Express, Inc., 802 F.2d 787 (5th Cir. 1986).

On or about December 17, 1986, the Objectors filed their Petition for Writ of Certiorari to this Court. They urge, as a basis for the granting of certiorari, the overturning of this Court's decision in International Brotherhood of Teamsters v. United States, 431 U.S. 324 (1977).

As this Court has noted in its rules, "[a] review on writ of certiorari is not a matter of right, but of judicial discretion, and will be granted only when there are special and important reasons therefore. The following, while neither controlling nor fully measuring the Court's discretion, indicate the character of reasons that will be considered.

(a) When a federal court of appeals has rendered a decision in conflict with a decision of another federal court of appeals on the same matter; or has decided a federal question in a way in conflict with a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court, as to call for an exercise of this Court's power of supervision.

(b) When a state court of last resort has decided a federal question in a way in conflict with the decision of another state court of last resort or if a federal court of appeals.

> (c) When a state court or federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court."

Sup. Ct. R. 17.1.

It is undisputed that the Petitioners do not seek to justify their request for writ of certiorari based upon the considerations set forth in Rule 17. Indeed, it is their plea to this Court, to overturn its long established and well-reasoned decision in International Brotherhood of Teamsters, supra, which underscores the frivolous nature of the petition.

The underlying motivation of this frivolous petition becomes only too clear when read in conjunction with the Consent Decree. The Consent Decree reads, in relevant part, as follows:

> "In lieu of any rate of interest, statutory or otherwise, which may accrue on any amounts to be paid pursuant to this Decree, interest at a rate of 10.5 percent per annum, **will begin to accrue only on the back-pay settlement amounts upon the filing of a notice of appeal and will accrue at such rate until said appeal is dismissed or a decision upholding this Decree is issued by the Court of final review considering said appeal.**"

See Petitioner's Appendix at page 77a. (Emphasis added). As such, the incentive for such a frivolous appeal becomes apparent in light of the financial gains to be reaped by the Petitioners. Interest above market rates of return, on the funds to be distributed to the Petitioners, mounts with each passing day, and the Petitioners are well aware of that fact. The delay occasioned by this frivolous appeal, has been disapproved by this Court in the past as its precedent makes clear.

ARGUMENT AND AUTHORITIES

Statutory guidance, in the form of 28 U.S.C. §1912, and rules promulgated by this Court, Sup. Ct. R. 49, make it clear that a party who frivolously appeals an issue, in bad faith and/or for purposes of delay, faces the possibility of damages. Tne imprimatur of this Court, to levy damages for the delay occasioned by such frivolous appeals, should stand as a signal to those who file such appeals. See, Amory v. Amory, et. al., 91 U.S. 356 (1875); Deming v. Carlisle Packing Company, 226 U.S. 102 (1912); Wagner Electric Mfg. Co. v. Lyndon, et. al., 262 U.S. 226 (1923); Slaker v. O'Connor, et. al., 278 U.S. 188 (1929); Mississippi Railroad Company, et. al. v. Smith, 299 U.S. 518 (1936); and, Tatum v. Regents of

the University of Nebraska-Lincoln, et. al., 462 U.S. 1117 (1983).[1]

Indeed, under 28 U.S.C. §1912 and/or Rule 38, Fed. R. App. P.,[2] the federal courts of appeals have sanctioned appellants who have appealed on frivolous grounds. See, In Re Continental Investment Corporation, 642 F.2d 1 (1st Cir. 1981); Muigai v. United States Immigration and Naturalization Service, 682 F.2d 334 (2nd Cir. 1982); Munroe Auto Equipment Company, Hartwell Division v.

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1. While the older cases make reference to Section 1010 of the Revised Statutes and Rule 23 of the 1859 Revision of the Court's Rules, 21 How xii, these statutes and/or rules were the progenitors of the Court's present sanctions against frivolous appeals. See, 13 MOORE'S FEDERAL PRACTICE, ¶849.01[1].

2. Rule 49.2, Sup. Ct. R., is the counterpart of Rule 38 of the Federal Rules of Appellate Procedure. 13 MOORE'S FEDERAL PRACTICE, ¶849.03.

NLRB, 511 F.2d 611 (5th Cir. 1975); Ruderer v. Fines, 614 F.2d 1128 (7th Cir. 1980); Oliver v. Mercy Medical Center, Inc., 695 F.2d 379 (9th Cir. 1982) and, United States v. Rayco, Inc., 616 F.2d 462 (10th Cir. 1980).

Under Rule 49, the damages permitted for frivolous appeals apply only to cases in which a money judgment has been entered by tne Court below. Sup. Ct. R. 49. In this regard, the Consent Decree represents and establishes a money judgment for those class members meeting certain criteria and conditions.

Even assuming arguendo, that the Consent Decree cannot be classified as a money judgment, this Court's power, to render damages for delay under 28 U.S.C. §1912, is not so limited. Chief Justice Taft confirmed that axiom in Wagner Electric Mfg. Co. v. Lyndon:

> An objection to allowing damages in the present case suggesting itself is that the **decree appealed from was not a money judgment.** It is true that this whole litigation in the federal jurisdiction has been initiated and carried on solely to secure the delay of the payment of a money judgment in the state court, but that is hardly within the exact terms of the 23rd Rule. Sections 1010 and 1012, Rev. Stat., are, however, not so restrictive **and they give this Court power to impose just damages of any judgment or decree, for delay.** Gibbs v. Diekma, 131 U.S. Appendix clxxxvi.[3]

262 U.S. 226, 223. (Emphasis added).

PRAYER FOR RELIEF

WHEREFORE, Respondent Roadway Express, Inc., respectfully prays that this Court assess as damages for delay, in the prosecution of Petitioner's

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3. In the Gibbs case, this Court noted that the predecessor statute to 28 U.S.C. §1912 gave the Court "authority to adjudge damages for delay on appeals as well as writs of error, and our power is not confined to money judgments above."

frivolous appeal, the staying of the interest accruing under the Consent Decree, as to these 34 Petitioners. Respondent also prays for such other and further relief, botn at law and in equity, to which it may show itself justly entitled.

Respectfully submitted,

HARRIS & PADGETT
Incorporated
1200 South Texas Building
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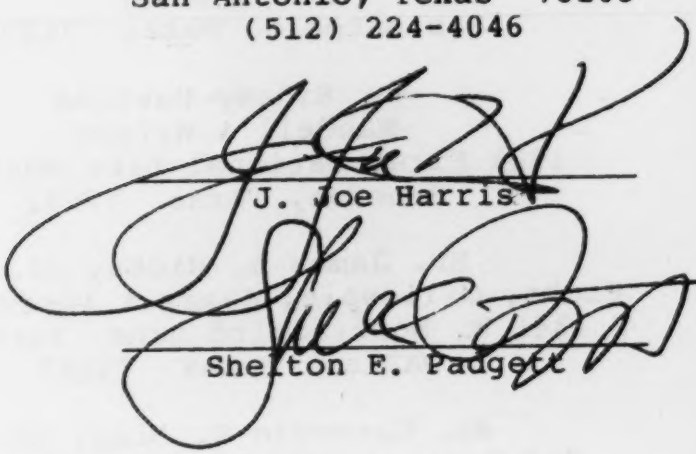

J. Joe Harris

Shelton E. Padgett

Certificate of Service

I hereby certify that a true and correct copy of the foregoing instrument was delivered by Certified Mail, Return Receipt Requested to:

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Nelkin & Nelkin
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Mr. Oscar W. Adams, III
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and

Mr. G. William Baab
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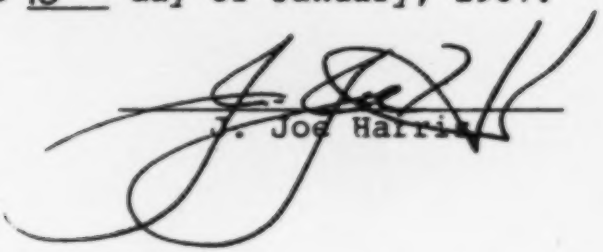
on this the 15th day of January, 1987.



J. Joe Harris

Supreme Court, U.S.
FILED
JAN 29 1987
JOSEPH F. SPANIOL, JR.
CLERK

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1986

NO. 86-1003 (N)

THOMAS SALINAS, ET AL.
Petitioners

v.

ROADWAY EXPRESS, INC., ET AL.
Respondents

On Writ of Certiorari to the United States
Court of Appeals for the Fifth Circuit

RESPONDENT UNIONS' BRIEF IN OPPOSITION TO THE PETITION FOR CERTIORARI

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Unions

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In The

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THOMAS SALINAS, ET AL.
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v.

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On Writ of Certiorari to the United States
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RESPONDENT UNIONS' BRIEF IN OPPOSITION TO THE PETITION FOR CERTIORARI

Respondents INTERNATIONAL BROTHERHOOD OF TEAMSTERS, CHAUFFEURS, WAREHOUSEMEN AND HELPERS OF AMERICA (hereinafter "IBT" or "International"). SOUTHERN CONFERENCE OF TEAMSTERS (hereinafter "SCT"), and LOCAL UNIONS 657 AND 988[1] respectfully request that this Court deny the Petition for Writ of Certiorari, seeking review of the Fifth Circuit's opinion in this case. That opinion is reported at 802 F.2d 787.

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[1] We are authorized to advise that all appellees in the court below join in opposition to the Petition, although not approving or adopting all the rationale herein.

For purposes of what follows, we accept the Petitioners' statement of Questions Presented and Statement of the Case.

REASONS WHY THE WRIT SHOULD BE DENIED

1. In essence, the Petition seeks a review of factual findings and evidentiary analysis, thus presenting no sufficient basis justifying grant of the Petition.

The Petition in this case seeks review of the Fifth Circuit's affirmance of a District Court judgment entering a Consent Decree in this prolonged litigation [now sixteen (16) years old]. Petitioners' complaint centers on the Consent Decree's grant of retroactive (to 1971) competitive job seniority in over-the-road jobs to ten (10) individual class members. The Petition generally complains that the Fifth Circuit erroneously affirmed the District Court's purported abuse of discretion in entering the Consent Decree, because the Decree's restriction of retroactive seniority relief to ten (10) named individuals was and is "not fair, just nor adequate..." and constitutes a "radical departure from the intent and purpose of Title VII. ..."[2] (Petition, pp. 7, 9, 12).

As noted by the Fifth Circuit, the Consent Decree approved by the District Court came at the conclusion of "protracted and emotionally charged negotiations ...", with the distinct possibility that by pursuing further litigation of the case "the plaintiffs' class would have risked dismissal of the action as untimely [under *United Airlines v. Evans,* 431 U.S. 553 (1977)], thereby losing *all* relief." (App. 4a; 802 F.2d at 788-89). The stark reality that further litigation of this case could well have resulted in denial of *any* relief to *all* class members cannot be overemphasized.

Prior to entering the Consent Decree, the District Court conducted proceedings to test the Decree's fairness, with but forty-two (42) members of the one hundred twenty-two (122)

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[2] The central statute involved, otherwise referred to as "the Act" is Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e, *et seq.*

member class stating objections to Decree provisions concerning back pay, seniority relief, or both. The District Court's ultimate conclusion that the Consent Decree was "fair, adequate and just" was buttressed by detailed findings of fact. The Fifth Circuit reviewed the entirety of these findings on the record before it, and concluded that "under applicable legal standards, the District Court's order entering the Consent Decree [should be] affirmed." (App. 8a; 802 F.2d at 790).

The gravamen of the Petition is to quarrel with evidentiary findings by the District Court, approved and adopted by the Fifth Circuit, that retroactive seniority relief accorded by the Consent Decree was reasonably related to road job vacancies available to class members during the period of time in which Roadway was purportedly discriminating in the filling of over-the-road driving jobs. The Fifth Circuit specifically addressed Petitioners' claim that the Consent Decree's retroactive seniority relief was insufficient, and rejected it. Rather, the Fifth Circuit held that there was "no support" in the record for the claim that the District Court incorrectly calculated the number of available vacancies upon which retroactive seniority relief could be based, and concluded that the District Court had properly acted within its discretion in approving the Consent Decree's grant of retroactive seniority to ten (10) named individuals. (App. 5A-6A; 802 F.2d at 789). As we have said, the predominate thrust of the Petition is to argue that factual findings which govern the number of available vacancies are erroneous. (Petition, pp. 9-12).

Petitioners do not seek resolution of a conflict among the Circuits, nor present for determination an important, unsettled point of federal law.[3] Instead, they merely continue their quarrel with the District Court's factual findings and related evidentiary analysis. It is axiomatic that this Court will not grant a Petition of Certiorari to review the lower courts' resolution of evidentiary issues. *E.g. General Talking Pictures Corp. v. Western Electric Co.*, 304 U.S. 175 (1938); *United States v. Johnston,* 268 U.S. 220 (1925). Thus, the Petition presents no proper basis for granting the Writ.

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[3] *See* Rule 17, Rules of the Supreme Court.

2. The Court should not grant the Petition for the purpose of "rethinking" *International Brotherhood of Teamsters v. United States.*[4]

Tacitly acknowledging that this Court cannot grant petitions for the purpose of reviewing lower courts' factual findings, Petitioners are ultimately compelled to argue that this Court should "rethink" its holding in *International Brotherhood of Teamsters v. United States*," 431 U.S. 324 (1977). (Petition, pp. 7-9).

Teamsters is indeed central to disposition of Petitioners' claim that the Consent Decree's seniority relief is inadequate. There, the Court was confronted with a claim that where a freight employer has discriminated against minority employees in the filling of road jobs, a contract seniority system which provides for road job seniority beginning with date of hire in the road bargaining unit unlawfully perpetuates the employer's discrimination, in violation of the Act. After careful consideration of the legislative history underlying Section 703(h) of the Act, 42 U.S.C. Section 2000e-2(h), the Court held that *bona fide* seniority systems, such as that in the case at bar, do not violate the Act simply because they provide for job seniority in a particular bargaining unit based on date of hire in that unit. (*See* 431 U.S. at 350-56). In the context of this holding, the Court in *Teamsters* then carefully analyzed and rejected the contention that where an employer discriminates against minority employees in the filling of over-the-road jobs, *all* members of the affected class are automatically entitled to retroactive seniority relief. Instead, the Court held that retroactive seniority relief must be restricted to *actual discriminatees*, those members of the class who are shown by record evidence (a) to have actively sought or desired road jobs, (b) to have been qualified for such road jobs and (c) as to whom *over-the-road job vacancies existed and were discriminatorily filled. Teamsters v. United States, supra* at 356-76. Petitioners' request that the Court now "rethink" *Teamsters* is a bald attempt to obtain

[4] 431 U.S. 324 (1977).

precisely the sort of indiscriminate class relief which *Teamsters* squarely rejected. Reversal of *Teamsters* is the only vehicle by which Petitioners may escape the effect of the lower courts' findings that the Consent Decree's retroactive seniority relief bears reasonable relation to available road job vacancies.

Teamsters cannot be swept away simply to serve Petitioners' peculiar personal interest. Indeed, an important element of this Court's holding in *Teamsters* has served as the touchstone by which federal courts have since sought to reconcile competing employee interests in fashioning Title VII relief.

This Court's refusal in *Teamsters* to countenance a general award of indiscriminate class-wide relief, without reference to proof of individual discrimination based on existing job vacancies, was grounded in a strong concern for the rights and interests of other innocent employees within the contract seniority system —the ability of these other innocent employees to protect and enjoy the job security and benifits *they* have earned by employment under the contract. *Teamsters, supra* at 372-73. *Teamsters* has since served as a linchpin for important decisions of this Court which reaffirm the contract rights of other innocent employees. *Firefighters Local Union No. 1784 v. Stotts,* 467 U.S. 561 (1984); *W.R. Grace & Co. v. Rubberworkers,* 461 U.S. 757 (1983); *Ford Motor Co. v. EEOC,* 458 U.S. 219 (1982). *Cf. Steelworkers v. Weber,* 443 U.S. 193 (1979). "Rethinking" of *Teamsters* for the purposes espoused by Petitioners—to obtain an award of indiscriminate classwide relief *regardless* of evidence concerning the existence of available vacancies—would require wholesale disregard of the rights of innocent employees, and could utterly shred the fabric carefully woven by the entire line of decisions recited above. Petitioners present not a whit of cogent legal argument warranting this drastic result.

Finally, it is significant that Petitioners' prayer for reversal of *Teamsters* comes in the context of judicial review of a consent decree. This Court has squarely held that under such circumstances, the lower court has relatively broad discretion in adopting and approving a consent decree, even one which provides for seniority relief seemingly at odds with existing case law. *See Local No. 44, Int'l. Assn. of Firefighters v. City of Cleveland,* _____ U.S. _____, 54 L.W. 5005 (1986). As we have said, in

this case both the District Court and the Fifth Circuit carefully analyzed the Consent Decree's seniority relief, and concluded that it bore reasonable relation to record evidence concerning available road job vacancies. Thus, as we have shown before, legal standards governing the award of seniority relief have been well served by the Consent Decree's approval below, and Petitioners present no valid equitable consideration to support their claim for more retroactive seniority relief. In short, it could serve no legitimate purpose whatsoever for this Court to "rethink" its landmark *Teamsters* decision in the context of a Consent Decree which, on any reasonable analysis, was properly approved and entered by the District Court in the sound exercise of its discretion, in compliance with governing case law.

CONCLUSION

For the reasons stated, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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& CLOUTMAN, P.C.
3301 Elm Street
Dallas, Texas 75226
214/939-9222

Original Signed by
G. WILLIAM BAAB

By: _____
G. William Baab

COUNSEL FOR RESPONDENTS
IBT, SCT, LOCALS 657 & 988

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the above and foregoing "Respondents Unions' Brief in Opposition to the Petition for Certiorari" has this day been forwarded by certified mail, return receipt requested, to counsel of record herein as follows:

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DATED this 26 day of January, 1987.

Original Signed by
G. WILLIAM BAAB

G. WILLIAM BAAB